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## **POLITICAL AUTHORITY AND POLITICAL OBLIGATION<sup>1</sup>**

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<sup>1</sup> I have benefitted from discussion when earlier versions of this paper were presented at the annual Analytic Legal Philosophy Conference (King's College London, 2009), as a lecture to the Bryn Mawr philosophy department, and at conferences or workshops at the following law schools: Cardozo, Graz, McGill, Penn, Tel Aviv, Toronto, UCLA, University College London, and USC. I am particularly indebted to the following persons for their comments: Matthew Adler, Anita Allen (who was my commentator at Penn), Jules Coleman, Bill Edmundson, David Enoch, Leslie Green, Mark Greenberg, Matthew Kramer, Dennis Klimchuk, Brian Leiter, George Letsas, Andrei Marmor, Helen McCabe (who was my commentator at Graz), Joseph Raz, Arthur Ripstein, Seana Shiffrin, Nicos Stavropoulos (who was my commentator at UCL), Jeremy Waldron, Douglas Weck, Ernest Weinrib, and Lorenzo Zucca.

## I. Introduction

Legitimate political authority, it is agreed by many, involves a right to rule. One very widespread and powerful understanding of what this means is that a political regime has a right to rule only if, among other things, it has a fairly extensive Hohfeldian power to change its subjects' normative situation by, for example, imposing obligations or conferring rights on them.<sup>2</sup> No doubt a right to rule involves much more than this.<sup>3</sup> Perhaps it involves not just a power to impose obligations but also a claim-right to compel compliance with those obligations by means of force or the threat of force.<sup>4</sup> For present purposes, however, it will be sufficient to focus on the

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<sup>2</sup> Joesph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 24: "The obligation to obey a person which is commonly regarded as entailed by the assertion that he has legitimate authority is nothing but the imputation to him of a power to bind."

<sup>3</sup> See infra note [49] and accompanying text.

<sup>4</sup> Theories of legitimate political authority tend to fall into one or the other of two categories: (1) those that focus initially on the justification of a normative power on the part of the state to change persons' normative situation; and (2) those that focus initially on the justification of the state's right to use coercion against its subjects. For the most part, the difference between these two types of theory concerns the justificatory relationship between the state's normative power and its right (which is presumably a claim-right) to use coercion. Theories of the first kind typically look for a justification of the state's power to change its subjects' normative situation that is independent of the right to use coercion, and then attempt to justify the right to coerce by reference to, inter alia, the normative power. Theories of the second type reverse this order of justification: They first offer a justification of the state's right legitimately to use force under certain circumstances, and then offer a justification of the state's general powers to change its subjects' normative situation that makes essential reference to this prior right. For a distinguished version of this second type of theory, see Arthur Ripstein,

point that legitimate political authority requires possession of extensive normative powers. Joseph Raz calls political regimes which have effective control over a population and which also claim legitimate authority for themselves, meaning they claim extensive powers to change the normative situation of their subjects, *de facto* authorities. Raz argues, in my view rightly, that a political regime can only have law and a legal system if it is a *de facto* authority in this sense. For present purposes it will be convenient to focus on the case of *de facto* authorities, which we can think of loosely as the governments of states with legal systems. Because such governments can, in the exercise of the extensive authority that they claim for themselves,<sup>5</sup> affect their subjects'

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"Authority and Coercion," *Philosophy and Public Affairs*, 32 (2004), 2. The theories of political authority that I discuss in this article are all of the first type, but since theories of the second type do not typically deny that states have the normative power to change their subjects' normative situation, I believe that one of the article's most important conclusions – that it is implausible to think that such a normative power can be justified by reference to an aggregation of the state's normative relations to its citizens considered one by one – generally applies to this category of theory as well. The key to Ripstein's Kantian theory, for example, is the idea that "rights [of individuals against one another] are understood as reciprocal limits on the freedom of everyone, which means that, if people are to have rights, all must be subject to the same limits." Ibid. 26. The idea of reciprocal limits on the freedom of all would seem to count, in the admittedly loose sense of the term that I employ in section VI below, as part of a non-aggregative justification of political authority. It is perhaps worth mentioning that there are some theories of the second type which claim to justify a Hohfeldian liberty or "justification-right" on the part of states to use coercion which does not involve a corresponding obligation on the part of citizens to obey. See, for example, Robert Ladenson, "In Defense of a Hobbesian Conception of the Law," *Philosophy and Public Affairs* 9 (1980), 139. (The term "justification-right" is Ladenson's.) For a convincing critique of Ladenson's view, see Raz, *The Morality of Freedom*, *supra* note [2], at 24-28.

<sup>5</sup> Raz argues that because legal systems, unlike other normative systems such as

lives in very significant ways and often against their will, the authority they claim to possess is moral in nature.<sup>6</sup> Although legal systems claim to be able to change the normative situation of their subjects in almost any conceivable way – for example, by granting permissions, conferring claim-rights, or creating immunities or new powers<sup>7</sup> – I will focus on the most fundamental power that legal systems claims for themselves, which is the power to impose obligations.<sup>8</sup> Let me refer

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commercial companies and sports organizations, acknowledge no limitations on the spheres of behavior which they have the power to regulate, their claim of authority is “comprehensive.” Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), 116-17. Elsewhere he makes a similar point by observing that even in states in which the power of the legislature to legislate is constitutionally limited, “the law” nonetheless claims unlimited authority for itself “because the law provides ways of changing the law and of adopting any law whatsoever. . . .” Raz, *The Morality of Freedom*, supra note [2], at 76-77. I have some doubts as to whether all legal systems really do make claims of unlimited authority of the kind Raz has in mind. In some countries some constitutional provisions may, according to the local constitution itself, be immune to amendment, as I understand may be the case with India. However, the point is not a significant one for present purposes. I do agree with Raz that (almost) all legal systems claim supreme authority, in the sense that wherever a subject matter is liable to regulation by law, the law is entitled to have the final say on the matter.

<sup>6</sup> See e.g., Joseph Raz, “Hart on Moral Rights and Legal Duties,” *Oxford Journal of Legal Studies* 4 (1984), 123.

<sup>7</sup> Cf. Stephen Perry, “Law and Obligation,” *The American Journal of Jurisprudence* 50 (2005), 263 at 267. Given the point stated in the text, the properly generalized version of a general obligation to obey the law is a claim that every legal norm has the normative effect that it purports to have. If the norm purports to impose an obligation, then it succeeds in creating an obligation; if it purports to create a claim-right, then it succeeds in creating a claim-right; and so on. See further *ibid.* 271-72.

<sup>8</sup> In this article, I use the terms “obligation” and “duty” interchangeably.

to the product of the exercise of a claimed power to impose obligations as a directive. If a directive was issued by an organ of a government which not only claims but also possesses legitimate authority, then those persons who fall within the scope of the directive have an obligation to obey it. Because legitimate authority is moral authority, this obligation is a moral obligation.

In Section II, I observe that many who have written on the nature of legitimate political authority approach this issue by arguing for or against the existence of a general obligation to obey the law. I consider the general conditions that must be met before a general obligation to obey the law can be said to exist, and, borrowing from the work of Leslie Green and Joseph Raz, I set out five conditions that seem to be very plausible requirements for this purpose. I note that most existing theories of political obligation fail to satisfy one of the conditions – universality of application – but I further note that this fact is more of practical than of theoretical interest. Nonetheless, almost every extant theory of political obligation fails to satisfy at least one, and sometimes more than one, of the other four conditions. Of greater interest for present purposes, however, is the fact that to argue for legitimate political authority by means of an intermediate conclusion that there exists a general obligation to obey the law is a very problematic strategy. This is because, although it is true that legitimate political authority (in the sense of a moral power) entails the existence of a general obligation to obey the law, the existence of a general obligation to obey the law does not, in and of itself, entail legitimate political authority. I call this “the reverse entailment problem,” which I illustrate with several examples.

In Section III, I ask why Green’s five conditions for the existence of an obligation to obey the law seem to be plausible ones, and reply that it is because they intuitively reflect the fact that an obligation to obey the law must flow from the exercise of a moral power to change someone else’s normative situation. This suggests that the conditions can be reformulated, and in some cases reformulated more precisely, by casting them in terms of authority (power) rather than in terms of obligation. This suggests in turn that we should begin our analysis of the related

problems of political authority and political obligation by focusing directly on the existence conditions for the appropriate kind of moral power, rather than on conditions that will justify the supposedly mediating conclusion that there exists a (general) moral obligation to obey the law. I begin to undertake this task by offering a conception of a moral power that seems plausible for this purpose. Relatedly, I argue that the idea, accepted implicitly or explicitly by many writers, that the normative correlative of “a right to rule” is an obligation, is mistaken. For one thing, treating the right to rule and an obligation to obey as correlatives tends to lead to reverse entailment problems. But secondly and more importantly, since the right to rule must be understood as a Hohfeldian power rather than, say, as a claim-right, the appropriate normative correlative is, in Hohfeldian terms, not an obligation but a liability. I further argue that this latter point is not merely a technicality but an important conceptual characteristic of legitimate political authority that places certain limits on what can count as an argument in favor of the moral legitimacy of the state.

Drawing on the conception of a moral power (and the associated conception of a liability) that I give, I describe two novel and surprisingly strong conditions, which I call the value-of-intentionality condition and the prospectivity condition, which bear directly on the existence or otherwise of legitimate political authority. The essence of the value-of-intentionality condition is, very roughly, that the conceptual and moral core of legitimate political authority (and probably of most forms of legitimate practical authority) is the ability of one person intentionally to change the normative situation of another, where it is sufficiently valuable or desirable that the first person possess such an ability with respect to the second. I call the resulting characterization of authority the “value-based” conception. The idea that the general concept of legitimate political authority should be analyzed by reference to the value-based conception is one of the fundamental claims of this article. The value-of-intentionality condition itself demands that any substantive theory which is meant to establish, in whole or in part, the moral legitimacy of the state must be consistent with the value-based conception. The second of the two conditions I mentioned, namely, the prospectivity condition, holds that any such substantive theory must also be

consistent with the fact that a legal directive which is issued by a legitimate political authority takes on obligatory force, in the usual case, at the exact moment that it is enacted or signed into law, and not at some later point in time. I then show how some of the standard criticisms of existing theories of political authority and political obligation can be reformulated by reference to these two conditions, and how the two conditions give rise to powerful new objections to these theories.

I should make clear that in this article I do not argue that the term “political legitimacy” (and related expressions) must necessarily be understood in terms of a Hohfeldian power and a Hohfeldian power only. These terms have been accorded many meanings in the literature. There are, for example, those theories, mainly of Kantian inspiration, that take the starting-point for determining political legitimacy to be the justification of coercion by the state.<sup>9</sup> There are also theories that argue that political legitimacy is founded on or supported by one or more of the following types of considerations: justice, equality, democracy, popular support, or hypothetical consent.<sup>10</sup> I do argue, however, that a Hohfeldian power – the ability of a state intentionally to change the normative status of its subjects – is, both morally and conceptually, the core understanding of political legitimacy. Obviously more needs to be said in support of this proposition, and I offer arguments in its defense in section III. For present purposes, I will simply make the following three brief observations. First, one dimension of the “Hohfeldian power” tradition is that it asks a question that is both clear and of great theoretical and moral significance: When the state, under color of its own claimed authority, tells us to do something, under what circumstances do we in fact have an obligation to do it as it says? Some of the theories that link legitimacy to democracy, say, or to popular support, do not ask such a crisp and important

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<sup>9</sup> See *supra* note [4].

<sup>10</sup> John Rawls, for example, says of his own theory of justice as fairness that “its principle of legitimacy [has] the same basis as the substantive principles of justice.” John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 225.



question, nor do they always make clear exactly what they take to be at stake, morally speaking, in characterizing a state as “legitimate.”<sup>11</sup> Second, different conceptions of “political legitimacy” are not necessarily in conflict with one another, so long as we understand that the term is being used in different ways. Third, although I do not think that a state must be, say, democratic in character to be politically legitimate, the link that many discern between political legitimacy and democracy can, as we shall see in section VI, be taken into account within the “Hohfeldian powers” approach, when it is appropriate to do so.

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<sup>11</sup> A. John Simmons has gone some ways towards clarifying what is morally at stake in such theories by distinguishing between “legitimacy” and “justification.” He defines legitimacy more or less as I have done here, namely, as a Hohfeldian power to impose obligations. (I will have more to say on Simmons’ understanding of legitimacy in section III below.) He defines “justification” as “showing that some realizable kind of state is on balance morally permissible (or ideal) and that it is rationally preferable to all feasible nonstate alternatives” (emphasis added). A. John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge, Cambridge University Press: 2001), 125-26. While this distinction is important and helpful, it should be pointed out that Simmons’ definition of ‘justification’ is stipulative and idiosyncratic; most writers on political philosophy tend to use the terms “legitimate” and “justified” as more or less synonymous, or at least as systematically related. Rawls, for example, writes that “[t]he basic structure and its public policies are to be justifiable to all citizens, as the principle of political legitimacy requires” (emphasis added). Rawls, *Political Liberalism*, supra note [10], at 224. See also Thomas Nagel, *Equality and Partiality* (New York: Oxford University Press, 1991), 330: “[T]he task of discovering the conditions of legitimacy is traditionally conceived as that of finding a way to justify a political system to everyone who is required to live under it” (emphasis added). I would prefer to say that Simmons’ has identified two different ways in which the term “political legitimacy” (and related terms) are used in the literature.

In section IV of the paper I identify two distinct but related problems of political authority. In the literature these are not always clearly distinguished, as they must be if we are to understand the concept of political authority as precisely as possible. The first problem, which I call the problem of justification, is one of the main topics of the paper: When, and under what circumstances, do states ever hold the legitimate moral authority that they claim for themselves? The second problem, which I call the subjection problem, is this: When are individuals ever justified in submitting their will to that of another person? The most important version of the subjection problem in the political context asks a mandatory rather than a permissive question: When are individuals ever obligated to subject their will to that of another person? The justification problem and the mandatory form of the subjection problem clearly overlap, but they are not, as some authors sometimes seem at least implicitly to assume, either identical or co-extensive.

The main topic of sections V and VI of the article is Joseph Raz's famous service conception of authority. In section V, I offer arguments intended to show that, even though Raz correctly diagnoses the problem of legitimate authority as a question about the existence and justification of a moral power claimed by the state, and even though he offers his theory as one that is intended directly to establish that states have the capacity to possess the full legitimate authority that they claim for themselves – a point, it should be noted, that is consistent with their never, as a matter of empirical fact, ever fully achieving this capacity – his theory of legitimate authority nevertheless falls victim to a number of problems. These include, but are not limited to, failing to meet both the value-of-intentionality condition and the prospectivity condition. I suggest that Raz's theory is best regarded as a response to the subjection problem rather than the justification problem.

In section VI, in the course of further discussion of Raz's theory, I suggest consideration of an alternative substantive account of legitimate political authority, which is that the most important answer to the question of whether or not states ever possess such authority should be

assessed by reference to the following idea: The most important function of the state is to accomplish particularly important moral goals that states are uniquely suited, or at least particularly well suited, to achieve on behalf of their subjects by means of the normative instrument of a capacity to impose obligations. Following Leslie Green, I call this the “task-efficacy” theory of authority. It is exemplified in the work of, among others, Elizabeth Anscombe and John Finnis. It should be emphasized that the task-efficacy view is a substantive theory of political authority, which is offered within the conceptual framework of the value-based conception described above. At times Raz seems to understand his service conception of authority mainly as a piece of conceptual analysis. At other times he clearly regards it as a substantive theory which is addressed to the justification problem, and which therefore contains within itself the resources for determining whether, and to what extent, particular states are morally legitimate. I argue that the value-based conception of authority provides a superior conceptual analysis to that of the service conception, and that the task-efficacy view offers a superior substantive theory.

In the course of the discussion in section VI, I observe that many important theories of political authority – including Raz’s theory and all forms of so-called ‘voluntaristic’ theories, including consent theories and the theory based on the principle of fair play – regard political authority in what I call an aggregative fashion. By “aggregative” I mean that the extent of legitimate authority of any given state – where such authority is regarded, obviously, as a matter of degree – is taken to be a function of (1) the total number of individuals over whom, considered one by one, the state can be said to hold legitimate authority and (2) the extent of legitimate authority held over each individual. Raz expresses this general idea when he writes that his particular theory of authority “concentrate[s] exclusively on a one-to-one relation between an authority and a single person subject to it,” adding that “[i]t is an advantage of [this] analysis that it is capable of accounting for authority over a group on the basis of authority relations between

individuals.”<sup>12</sup> Raz goes on to conclude that the service conception “invites a piecemeal approach to the question of authority of governments, which yields the conclusion that the extent of governmental authority varies from individual to individual, and is more limited than the authority governments claim for themselves in the case of most people.”<sup>13</sup> In the course of the discussion in section VI, I suggest that an aggregative approach to political authority is generally mistaken, and that the task-efficacy theory that I sketch should be understood in non-aggregative terms.

## II. The Nature of a General Obligation to Obey the Law

In an article surveying the state of the art in philosophical work on the issue of whether or not there exists a general duty to obey the law, William Edmundson expresses a widely held view when he writes that “The question: Is there a duty to obey the law? seems particularly urgent insofar as a No answer calls into question the very legitimacy of the state.”<sup>14</sup> Raz can be understood as making a similar point in an indirect and somewhat less dramatic fashion when he writes:

If there is no general obligation to obey, then the law does not have general authority, for to have authority is to have a right to rule those who are subject to it. And a right to rule entails a duty to obey.<sup>15</sup>

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<sup>12</sup> Raz, *The Morality of Freedom*, supra note [2], at 71.

<sup>13</sup> Ibid. 80.

<sup>14</sup> William A. Edmundson, “State of the Art: *The Duty to Obey the Law*” 10 *Legal Theory* 10 (2004), 215, at 215.

<sup>15</sup> Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), 325.

As was noted in the preceding section, Raz accepts that the right to rule which political authority involves must be understood as a moral power to issue obligation- or duty-imposing directives. If all the directives that have been issued by the state do in fact succeed in imposing or creating obligations, then of course anyone who falls within the scope of a given directive is bound by the obligation that, by hypothesis, the directive creates. Raz is thus correct to say, in the quote displayed above, that “a right to rule entails a duty to obey,” where I take him to mean that a right to rule entails a general duty to obey. If the state’s legitimate power to issue obligation-imposing directives has in all cases been exercised correctly, then every directive it has issued not only purports to impose an obligation but does in fact impose an obligation, from which it follows that we have, at the very least, a pro tanto obligation to obey each and every such directive; in that sense, we have a general obligation to obey the law. If, however, the state has issued at least some directives that, for whatever reason, fail to impose obligations, then it is false that we have a general obligation to obey the law; there are at least some directives that we do not have even a pro tanto obligation to obey. It readily follows by modus tollens that the state does not possess the right to rule. If a state lacks the right to rule, then it lacks legitimacy in the sense defined at the beginning of this article. It is of course true that Raz, like many other theorists, allows for the possibility that the right to rule, and the associated conception of legitimacy, can be matters of degree. For present purposes, however, the important point to note is simply that, according to premises accepted by Edmundson, Raz, and many other writers, there is a clear sense in which the absence of a general obligation to obey the law calls into question the law’s legitimacy.

I believe that Edmundson and Raz are clearly correct that there is a general connection between the existence of a general obligation to obey the law and the moral legitimacy of the state. As Raz says, “a right to rule entails a [general] duty to obey;” if there is no duty to obey then there is no right to rule, in the sense of a general power on the part of the state to impose obligations; if there is no such power, there is at least one important sense in which the state lacks (full) legitimate authority. Of course, the proposition that a right to rule entails a general duty to obey does not itself entail, certainly as a matter of logic, that a general duty to obey entails a right

to rule. Moreover, we can easily imagine circumstances in which there is a general obligation to obey the law, at least in the sense that there is an obligation to conform one's conduct with each and every legal directive, but we nonetheless remain, at best, uncertain as to whether or not the state has a right to rule. Let me call this the "reverse-entailment" problem. Its essence is that the existence of legitimate authority logically entails an obligation to obey, but an obligation to obey does not logically entail the existence of legitimate authority. Note that this problem does not depend on the understanding of legitimate authority as a Hohfeldian power. It can arise even if legitimate authority – the right to rule – is understood as, say, a claim-right. The difficulty is that the general obligation to obey might not be the right kind of obligation to support the existence of legitimate authority, however the latter concept is understood.

Imagine, for example, that there is a duty to conform one's conduct with each and every directive of a given state because, as it happens, each and every directive reproduces an independent moral obligation. Thus there is an obligation to conform one's conduct to a directive prohibiting unjustified killing because there is an independent moral obligation not to commit acts of unjustified killing; there is an obligation to conform one's conduct to a directive prohibiting theft, because there is an independent moral obligation not to commit acts of theft; and so on. Even if there were, in a given state, a general obligation to "obey" each and every directive in the sense just characterized, we would still be justified in withholding judgment on the question of whether or not the state had the legitimate authority – the moral power – to enact these directives. All we could say for sure is that the state had, as it happened, enacted directives with good moral content.

Referring to the situation described in the previous paragraph, it could perhaps be argued that if people are motivated to do as the law requires, not because the law requires it, but rather because they are conforming with independent obligations of morality, they are not really obeying the law at all. On the other hand, it seems very odd to say, if one refrains from taking another's book for the sole reason that it would be morally wrong to do so, that one has somehow failed to

obey the law of theft. These puzzles indicate that if we are truly to understand the relationship between legitimate political authority and a general obligation to obey the law, we must state much more clearly just what a general obligation to obey the law is. As we shall see in section III, some writers have come very close to maintaining that a general obligation to obey the law entails the existence of a right to rule. At the very least, they appear implicitly to presuppose the truth of some version of this proposition, since they offer arguments that are clearly intended to bear on the existence of a right to rule, but which are formulated entirely by reference to the question of whether or not there is a general obligation to obey. What, then, does it mean to say that there is a general obligation to obey the law?

Leslie Green has very helpfully set out five conditions that an argument (or set of arguments) must meet in order to establish the existence of a general obligation to obey the law,<sup>16</sup> and his formulation provides an excellent starting-point for discussion.<sup>17</sup> To justify the conclusion that there is, within a given legal system, a general obligation to obey the law, the supporting argument or arguments must, according to Green, show that this obligation is (i) a moral reason for action; (ii) a content-independent reason for action, meaning a reason to do as the state directs because the state directs it and not because its directives have a certain content; (iii) a binding or mandatory reason for action, as opposed to a reason which simply happens to outweigh other relevant reasons; (iv) a particular reason for action, meaning a reason that arises only for the directives of a citizen's (or subject's) own state, and not for the directives of other states; and, finally, (v) a universal reason for action, in the double sense that it binds all of a state's citizens to all of that state's laws. Green argues, along with Raz, A. John Simmons, and others, that no argument (or combination of arguments) for a general obligation to obey the law that has so far been advanced succeeds in meeting all five conditions. The most pervasive

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<sup>16</sup> Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1990), 224-29.

<sup>17</sup> I should note that Green clearly does not make the mistake of assuming that a general obligation to obey the law necessarily entails the existence of a right to rule.

difficulty, according to Green, is a failure to meet condition (v), the universality condition. As an empirical matter, argue Green and many others, it is never true that, for any given legal system, each and every legal directive gives rise to a moral obligation to obey that directive which holds for each and every person who falls within the directive's scope. This is a very plausible claim. Since, however, our current interest is in the theoretical connection between political legitimacy and a (general or partial) obligation to obey the law, and not in the empirical fact, if it is indeed a fact, that no general obligation to obey ever actually exists, we can for present purposes set condition (v) aside. In any event, as has already been noted, many writers accept that, even if there is no general obligation to obey because condition (v) has not been met, the existence of even a partial obligation to obey is relevant to the legitimacy of the state, because legitimacy is not an all-or-nothing matter; it is, they argue, a matter of degree.

Condition (i), which states that a general obligation must be a moral reason for action, is clearly of a piece with Raz's idea that the law claims for itself not just authority, but moral authority; if the claim is justified, then there exists, not just an obligation, but a moral obligation, to obey the law. Condition (iii) is, in a sense, simply a restatement of the requirement that an obligation to obey the law must be an obligation. There are various interpretations of what the mandatoriness of an obligation consists in – Raz's theory of exclusionary reasons is a prominent example – but this is not an issue that must be settled for present purposes. Condition (iv) states that if a legal system gives rise to a general (or partial) obligation to obey the law, then it binds only those citizens (or subjects) who are, in some appropriate sense, subject to that legal system. This is a rather vaguely stated requirement, but it has often been cited to rule out arguments for an obligation to obey the law which are based on John Rawls' thesis that there is a "fundamental natural duty of justice" which "requires us to comport and comply with just institutions that exist and apply to us."<sup>18</sup> Although interesting attempts have been made to give content to Rawls' idea

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John Rawls, *A Theory of Justice* (Cambridge, Mass.: rev. ed., 1999) 99.



that the natural duty of justice only arises in cases of just institutions that “apply to us,”<sup>19</sup> these are controversial. The prevalent view is probably that of Ronald Dworkin, who argues that Rawls’ natural duty to comport and comply with just institutions is tied insufficiently tightly to the institutions of one’s own state, as opposed to just institutions wherever they may be found in the world.<sup>20</sup> Beyond that, it is in any event not entirely clear how a natural duty to “comport and comply with” just institutions translates into a general obligation to obey the law.

Green labels condition (ii) of his five conditions for the existence of a general obligation to obey the law “Content-Independence.” He writes that “the core idea [of content-independence] is the fact that some action is legally required must itself count in the practical reasoning of the citizens, independently of the nature and merits of that action.”<sup>21</sup> Notice that this formulation in fact expresses two sub-conditions, or, as I shall call them, constraints. One is negative in character, and the other positive. The negative constraint is that the “nature and merits” of a legally-required action must not count in the practical reasoning of citizens as they decide whether or not they are obligated by the relevant legal directive. It is this negative constraint which is properly labeled one of “content-independence,” or, better, “merit-independence.”<sup>22</sup> The second, positive constraint requires “that the fact that some action is legally required must itself count in the practical reasoning of the citizens.” Robert Paul Wolff states an often-cited and

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<sup>19</sup> For a distinguished example, see Jeremy Waldron, “Special Ties and Natural Duties,” *Philosophy and Public Affairs* 22 (1993), 3.

<sup>20</sup> Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: Harvard University Press, 1986), 193.

<sup>21</sup> Green, *The Authority of the State*, supra note [16], at 225.

<sup>22</sup> The term “content-independence” was originally introduced by Hart. As John Gardner has pointed out, the essential idea is that legal reasons derive their status as legal reasons independently of their merit, not independently of their content as such. John Gardner, “Legal Positivism: 5 ½ Myths,” *American Journal of Jurisprudence* 46 (2005), 199, at 208-09.

influential version of a very similar requirement when he writes that “[o]bedience is not a matter of doing what someone tells you to do. It is a matter of doing what he tells you to do because he tells you to do it.”<sup>23</sup> The point that Wolff and Green are making is sometimes put by saying that obedience requires not just conformity with a directive, where conformity means simply doing what the directive requires. Obedience, it is said, also demands compliance, which means that the directive must actually figure in the practical reasoning which leads an individual to do as the directive requires.<sup>24</sup> While it may well be true that, in some contexts, “obedience” does require compliance in addition to conformity, as a general matter this is simply not true when we are speaking of obligations to obey the law, and this is so whether we are speaking of a general obligation to obey (i.e., an obligation on the part of all subjects to obey all laws), or simply of obligations to obey specific legal directives on specific occasions. This is clearly true as a matter of general usage, and it is usually true as a matter of legal usage as well. This latter point is true because the law, for the most part, does not care why we do what it requires, so long as we do it.<sup>25</sup>

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<sup>23</sup> Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper & Row, 1970), 9 (emphasis in original).

<sup>24</sup> Raz discusses the distinction between conformity and compliance in *Practical Reason and Norms* 178-79 (Princeton: Princeton University Press, rev. ed., 1990), 178-79. Edmundson draws a similar distinction using slightly different terminology: See Edmundson, *supra* note [14], at 217. In more recent work Green states explicitly the view I am attributing to him in the text when he writes that “to obey is not merely to comply with the law; it is to be guided by it” (emphasis in original). Les Green, “Legal Obligation and Authority,” Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/legal-obligation/> at 5. (Green here uses the term “comply” in the sense that I am using the term “conform,” but I believe this is just a matter of different terminology.)

<sup>25</sup> Sometimes the law requires that one must not just conform with a specific legal directive but also comply with it, but, at least so far as ordinary citizens are concerned, such cases are exceptional. Scott Shapiro has emphasized that it is a crucial aspect of H.L.A. Hart’s theory

Furthermore, most theoretical discussions of the obligation to obey the law also assume, at least implicitly if not always explicitly, that conformity is generally sufficient to count as obedience.

The difficulty with Green's formulation of his condition (ii) is that both the negative and the positive constraints are formulated in terms of the actual practical reasoning that is supposedly required of persons to ensure that what they are doing counts as obeying the law. The preferable formulation, I suggest, should simply look to what is required for the existence of the obligation. Thus the negative constraint – the one concerning content-independence – should be that the (moral) merits of the directive, considered apart from its status as law, should not figure in the argument demonstrating that the directive gives rise to an obligation. Content-independence is thus understood as a constraint on the type of argument that can be offered to demonstrate that a directive is obligatory, and this is of course a very different matter from a constraint on the practical reasoning of persons who are supposedly bound by the directive.

How, then, are we to understand the positive constraint of Green's condition (ii), if not in terms of the distinction between conformity and compliance (and thus not by reference to the actual practical reasoning of individuals)? The better understanding of the positive constraint is, I believe, captured by Raz when he writes that "[t]he obligation to obey the law implies that the reason to do that which is required by the law is the very fact that it is so required. At the very

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of law that officials, as opposed to ordinary persons, must, when acting in their official capacity, comply with the law and not just conform with it. (I have expressed the point using my terminology, not Hart or Shapiro's.) This is the key to understanding Hart's notion of the internal point of view. For ordinary persons, according to Hart, it is sufficient for what they do to count as obeying the law if they conform with it. See Scott J. Shapiro, "On Hart's Way Out," *Legal Theory* 4 (1998), 469, discussing H.L.A. Hart, *The Concept of Law* (2<sup>nd</sup> ed, Oxford: Oxford University Press, 1994, P. Bulloch and J. Raz eds.), 113-17, 203.

least this should be part of the reason to obey.”<sup>26</sup> Notice that this formulation makes no mention of the practical reasoning of individuals who obey (or disobey) the law, but speaks, rather, of the “reason to do that which is required by the law.” I take this to mean that the argument for the existence of the obligation to obey the directive must make essential reference to the existence of the directive, in a sense of existence to be spelled out either by reference to the fact of the directive’s individual enactment by a de facto authority or to its status as one enacted directive in a system of such directives. A different way to formulate the positive constraint would be to say that the existence of the legal directive must be the ground, or at least part of the ground, of any moral duty to obey the directive which arises by virtue of its status as a legal directive.<sup>27</sup> Putting the positive and negative constraints together, we arrive at something like the following: In the case of any legal directive which attempts to impose a requirement on someone to do X, any argument demonstrating that there is a moral duty to obey the directive which arises by virtue of the directive’s status as law must take the existence of the directive as the ground or part of the ground of the duty, but must not make essential reference to the independent merits of doing X. This reworking of Green’s condition (ii) formulates its positive and negative sub-conditions not as constraints on anyone’s actual practical reasoning, but rather as constraints on what can count as an argument that is capable of establishing that there is a (moral) obligation to obey a legal

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<sup>26</sup> Raz, *The Authority of Law*, supra note [5], at 234.

<sup>27</sup> It is worth mentioning that this way of reading Green’s condition (ii) has the incidental benefit of explaining how there can ever be a moral duty that flows from the law to do that which we already have an independent duty to do. For example, even though we already have an independent moral duty not to kill others without justification, a legal directive that specifies that we are prohibited from killing others without justification is, in principle, capable of giving us a new ground for the same moral duty, at least so long as a moral argument can be given that, inter alia, meets condition (ii). There is of course no reason in principle why a given moral duty cannot have more than one ground.

directive, such that the obligation can be said to arise by virtue of the directive's status as law. Since our main purpose in formulating conditions for the existence of a general obligation to obey the law is precisely to discover whether or not there is or can be a systematic moral duty to obey legal directives which arises from the status of such directives as law, condition (ii), as reformulated, has a very strong claim to be regarded as the theoretically most significant of Green's five conditions. I will sometimes refer to the reformulated condition (ii) as the "directive-as-ground" condition – DAG for short – where this condition is to be understood as including both the positive and negative constraints as I have discussed them. From now on, I will assume that Raz's version of the positive constraint, quoted earlier, should be understood in terms of the DAG condition as I have just formulated it. I believe this is reasonable, because even though Raz does not specifically mention the negative constraint – content-independence – he appears to assume it.

The formulation of the DAG condition that I offered in the preceding paragraph is clearly a first approximation only, and would undoubtedly require much refinement to ensure that it applies only to the arguments that, intuitively, we think it should apply to. As Raz points out, in connection with what I have been calling the positive constraint, "[i]t is easy to find examples where the fact that the law requires an act is a reason to perform it."<sup>28</sup> Many such examples will arise from odd circumstances that, intuitively, we would not think capable of being generalized so as to support a general obligation to obey the law. Raz gives the example of a person who has a reason not to break the law because his or her doing so will aggrieve a loved one.<sup>29</sup> Raz says that

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<sup>28</sup> Ibid. 234.

<sup>29</sup> Notice that the loved one might be aggrieved only by the breaking of laws which have a certain content, for example those which regulate sexual morality. In that case we would appear to have an example of an argument to obey (certain) laws that meets the positive, directive-as-ground constraint, but that does not meet the negative constraint of content-independence. If correct, I believe this goes some way towards showing that the two constraints

such considerations “do not even tend to show that there is an obligation to obey the law,” because “[t]he obligation to obey the law is a general obligation applying to all the law’s subjects and to all the laws on all the occasions to which they apply.”<sup>30</sup> Ideally, then, it would obviously be desirable to have a much more refined and discriminating version of both the DAG condition in general and of its positive constraint in particular, but it is difficult to see how to go about making the necessary refinements, and Raz does not make the attempt. All he says is that, while the grounds of obedience need not be the same for everyone or for every occasion, they should be of sufficient generality so that a few sets of such considerations “will apply on all occasions.” He continues:

The search for a [general] obligation to obey the law of a certain country is an inquiry into whether there is a set of true premisses which entail that everyone . . . ought always to do as those laws require and which include the fact that those actions are required by law as a non-redundant premiss.<sup>31</sup>

Although Raz does not offer a more precise version of the DAG condition, he does give several examples of argument-types which he apparently thinks meet the requirement of sufficient generality as stated in the passage displayed above. The first is the argument that at least some persons have a reason, on at least some occasions, to obey the law so as not to set a bad example for others. The second type of argument is based on promises or other types of commitments that individuals sometimes give to obey the law. The third type of argument is based on estoppel and

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are independent of one another.

<sup>30</sup> Ibid. Notice that the reason Raz gives as to why these considerations are insufficient to establish a general obligation to obey the law amounts to a failure to meet Green’s condition (v), which is the universality condition.

<sup>31</sup> Ibid.

various kinds of semi-estoppel.<sup>32</sup> Thus, for example, if I knowingly induce another person to obey the law by acting in a way that leads him or her to believe that I will obey the law myself, I should, all other things being equal, obey the law, at least if disobeying it would adversely affect the person whom I have induced to rely. I believe that all three argument-types can be shown to meet the DAG condition. Raz states, correctly, that all three types of argument are important, and capable of establishing that individuals at least sometimes have obligations to obey the law on at least some occasions. But he also states, very plausibly, that as an empirical matter these arguments are not capable, either individually or jointly, of establishing a general obligation to obey the law. Putting the point in terms of Green's conditions, there is a massive failure, on the part of all three arguments, to meet condition (v), the universality condition.

For purposes of considering a concrete example, let me focus on the argument that one should obey the law because failing to do so will set a bad example for others. This argument clearly meets the directive-as-ground requirement, since the existence of an enacted directive requiring one to do X is at least one necessary element of the argument that one should indeed do X; it is only because there exists a legal directive requiring that X should be done that failing to do X could set a bad example. Raz is clearly correct that this argument will, for empirical reasons, invariably fall short of establishing a general obligation to obey the law. But since the failure is due to empirical considerations, we can easily perform the following thought experiment. However implausible this may seem, imagine that circumstances are such that, for a given legal system, any instance of law-breaking whatsoever will inevitably take place under conditions that will set a bad example for others, and that for that reason every subject of the legal system has at least a pro tanto obligation to obey each and every law. Perhaps new technologies make it virtually impossible to conceal acts of law-breaking, and perhaps the moral sensibilities of each and every person subject to the law are such that the breaking of any law, whatever its specific content (good or bad) or however trivial its subject matter, will have the effect of

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Ibid. 238-39.

encouraging more law-breaking. It should be noted that, so long as this latter assumption is true, then the good that will come from setting a good example by obeying the law will not depend on the content of the particular law obeyed, from which it follows that the resulting argument for a general obligation to obey the law will meet the negative as well as the positive constraint of the DAG condition.<sup>33</sup>

I believe it is clear that the argument from not setting a bad example would, under the conditions described in the preceding paragraph, meet all five of Green's conditions for the existence of a general obligation to obey the law, where condition (ii) is understood by reference to the reformulated DAG condition. But I think it is equally clear that, intuitively, the fact that there is a general obligation to obey all the directives of a legal system which is based on the undesirability of setting a bad example is insufficient to establish that the relevant *de facto* authority had the legitimate moral authority – the moral power – to enact those directives. Putting

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<sup>33</sup> To keep the example simple, assume that every act of obeying a law has a general and indiscriminate tendency to encourage all other persons to obey all laws, and that every act of disobeying a law has a general and indiscriminate tendency to encourage all other persons to break all laws. To make the example work, we do not need to assume that every law is a good or a just one, because we are supposing that the breaking of any law, whether good or bad in content, will lead to the breaking of further laws, and that the breaking of further laws, whether these are good or bad in content, is on balance a bad thing. These assumptions make most sense if at least some laws – we do not need to know which ones – have good or just content, but consider another possibility. Suppose that every law in a given system has bad or unjust content, but we have no way of knowing this. Since, by hypothesis, all law-breaking encourages more law-breaking, a plausible result of an epidemic of law-breaking might be utter social chaos. On one set of moral and empirical assumptions, such chaos would be a morally worse situation than the original set of unjust laws. (However, it should be noted that because this conclusion would partly depend on both moral and empirical premises, it is also conceivable that a set of unjust laws is so evil that social chaos would be the morally preferable alternative.)



the point more strongly, the argument from setting a bad example does not even appear to be an argument of the right type. The very idea of setting a bad example seems to assume either that the content of at least some laws has independent moral merit or – perhaps more to the point – that there is some good to be derived, at least potentially, from some persons having the moral power to subject other persons to obligations. It is arguments that are capable of establishing the latter conclusion that we are interested in, but, far from being such an argument itself, the argument from not setting a bad example presupposes either that such a power already exists and has been exercised in beneficial ways, or that at least some laws have independent moral merit.<sup>34</sup> Here, then, we have a very clear example of a reverse entailment problem.

Green's five conditions for the existence of a general obligation to obey the law – with condition (ii) reformulated as the DAG condition – are as plausible a set of conditions for the existence of such an obligation as I can at present imagine. But even so, I think the example of the argument from not setting a bad example shows that satisfaction of those conditions is

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<sup>34</sup> Perhaps it might be suggested that, because the argument from not setting a bad example presupposes that at least some laws have moral merit – whether because of their independent content or because they were enacted by a legitimate authority – the argument does not meet the content-independence constraint. In response, note first that, as was suggested in the preceding footnote, a version of the argument can be constructed even on the assumption that no law has any moral merit whatsoever. But set that possibility aside, and assume that at least some laws have moral merit. The argument that one should obey this particular directive would not be grounded in the merits of doing what this particular directive happens to require, but rather in the fact that there is reason to think that, as a general matter, some laws – where, let us suppose, we cannot specify which ones – have meritorious content. I am not sure whether this feature of the argument would meet a properly reformulated constraint of content-independence or not. All I can think to suggest here is that if someone thinks this, then he or she should explicitly set out the properly reformulated content-independence constraint so that it can be assessed in its own terms.

insufficient to establish that the state that enacted the laws had the legitimate moral authority to do so. Nor is there any reason to think that this failure is peculiar to the argument from not setting a bad example. The argument as I formulated it only met condition (v) – the universality condition – because of the very artificial empirical circumstances that I stipulated. Under actually existing conditions, the argument ordinarily fails the universality test. Most of the arguments that have been offered in the literature as candidates for establishing the existence of a general obligation to obey the law likewise fail to meet the universality condition. In addition, most also fail to meet at least one of the other four conditions, so they do not even get as far as my admittedly very artificial version of the argument from not setting a bad example. Usually this is enough to demonstrate, perhaps intuitively but nonetheless quite powerfully, that the argument is incapable of establishing the moral legitimacy of the relevant *de facto* authority. Let us consider a few examples.

I have already mentioned that, without more, Rawls' view that there is a "fundamental natural duty of justice" which "requires us to comport and comply with just institutions that exist and apply to us" fails Green's condition (iv).<sup>35</sup> Condition (iv) is the requirement that a general obligation to obey the law must be a particular reason for action, meaning a reason that arises

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<sup>35</sup> It might be argued that the requirement that the institutions be "just" means that the argument fails the constraint of content-independence. This is not strictly true, since the argument does not purport to make the obligation to obey this particular directive depend on the fact that this directive is a just one. On the contrary, the whole idea is to make the obligation to obey particular laws depend on a more systemic requirement of justice, which could well entail that one has an obligation to obey laws that, considered on their own, are unjust. As an empirical matter, it is almost certain that any legal system appropriately characterizable as "just" will contain at least some laws that are unjust. Even so, it is possible that the argument from a natural duty of justice fails a reformulated and more general requirement of content-independence. See further the discussion in the preceding note.

only for the directives of a citizen's (or subject's) own state, and not for the directives of other states. It is possible that arguments such as Jeremy Waldron's, which are intended to make more precise the idea that given institutions "apply to us," are capable of rectifying the failure to meet condition (iv).<sup>36</sup> I cannot undertake the task of assessing that claim here. For present purposes, it will have to suffice to point out that overcoming the failure to meet condition (iv) will not just make Rawls' argument more precise, but will in all likelihood fundamentally transform it. On its face, the failure to tie the purported obligation to obey the law to the laws of a person's own state makes it impossible to justify the fact that de facto authorities do not simply make a general or unlimited claim of authority over everyone in the world, but rather make more specific claims of authority over members of a particular group.<sup>37</sup> The details of how membership is or should be specified are usually conceived at least in part by reference to citizenship – a moral notion that itself requires explanation – or residency, either permanent or temporary, within a particular territory. Any argument that hopes to justify the claim of this particular state to hold legitimate authority over this particular group of persons, and only this particular group of persons, will have to specify some such notion of membership.

Consider next the argument that, under certain conditions, and more particularly the condition that there is a plausible interpretation of the state's laws, considered as a whole, such that those laws can be said to treat citizens with equal respect and concern, there arises a general obligation to obey the law which is analogous to the so-called associative obligations that arise within families and among friends. Ronald Dworkin's argument for the existence of a general

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<sup>36</sup> See Waldron, *supra* note [19].

<sup>37</sup> The content of the state's claim of authority over the members of the group is said by Raz to be unlimited, in the sense that it acknowledges no limits on the spheres of behavior which the state has the power to regulate. In my view it is not obvious that the state's claim of authority is always unlimited, but the point is a minor one for present purposes. See further *supra* note [5].

obligation to obey the laws of one's own state if those laws meet his test of overall integrity is the best-known contemporary version of such a theory.<sup>38</sup> This type of argument faces many obstacles, one of which is that, while the argument maintains that citizens stand in a relation to one another that is – like the relations among friends and family – appropriately particularistic, it simply does not make good on the claim that citizenship is sufficiently similar to the intimate and very personal relationships of friendship and family to sustain the argument based on analogy.<sup>39</sup> This objection amounts, in effect, to a claim that the argument from integrity does not, superficial appearances to the contrary notwithstanding, meet Green's condition (iv) (the requirement of particularity).

Another, even more formidable obstacle faced by arguments like Dworkin's is the objection that associative obligations are not, for the most part, thought to include obligations to obey, but rather to be limited to obligations to assist, trust, and respect the views of one's friends and the members of one's immediate family.<sup>40</sup> If this objection is correct, then we do not even

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<sup>38</sup> Dworkin, *Law's Empire*, supra note [20], at 176-224.

<sup>39</sup> Jules Coleman, for example, makes this argument. See Jules Coleman, "Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence," 27 *Oxford Journal of Legal Studies* 27 (2007), 581, at 591.

<sup>40</sup> See Denise Réaume, "Is Integrity a Virtue?: Dworkin's Theory of Legal Obligation" *University of Toronto Law Journal* 39 (1989), 380; Green, "Associative Obligations and the State", in Justine Burley, ed., *Dworkin and His Critics* (Oxford: Blackwell Publishing, 2004), 267. Elsewhere I have attempted to offer an interpretation of Dworkin's argument that would meet this objection. See Stephen Perry, "Associative Obligations and the Obligation to Obey the Law," in Scott Hershovtiz, ed., *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford: Oxford University Press, 2006), 183. Dworkin has, however, rejected this interpretation. See Ronald Dworkin, "Response," in Hershovtiz, *Exploring Law's Empire*, 291 at 304-05.

reach the stage of asking whether any obligations the argument might be capable of justifying meet Green's five conditions, because those conditions only apply to obligations of obedience. A fortiori, the argument would seem incapable of justifying a power to enact directives that impose obligations of obedience.

Consider next the argument from fair play. This argument, in the important formulation offered by A. John Simmons,<sup>41</sup> claims something like the following: When persons are engaged in a certain kind of cooperative enterprise, which is, let us assume, governed by rules, those who have accepted the benefits of the enterprise, in an appropriate sense of "accepted," have a duty "to do their fair share" by submitting to the rules when the rules require it.<sup>42</sup> I believe that this argument is capable, in appropriate circumstances, of justifying a duty "to do one's fair share," and that this duty may include a duty to submit to the rules of an enterprise, in an appropriate sense of "submit." In the political context, the duty that arises will almost always, as an empirical matter, fail Green's condition (v) (the universality condition); the existence of the duty is conditioned on a voluntary act, namely, the acceptance of benefits, and most people, most of the time, cannot be said to have engaged in such an act. But of course, for present purposes, our interest is in whether or not the duty that arises meets the other four conditions. There is much to be said about this question, which cannot be considered in detail here. But one powerful argument that the duty which is sometimes generated by the argument from fair play fails, in effect, to meet our reformulated condition (ii) – the duty-as-ground condition – is offered by Jules Coleman: "If there is a duty of fair play to comply with the law, it is not grounded in law, but is instead contingent upon the compliance of others with the law. It is not a duty whose ground is the law,

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<sup>41</sup> A. John Simmons, "The Principle of Fair Play," *Philosophy & Public Affairs* 8 (1979), 307

<sup>42</sup> Simmons does not in fact insist that the enterprise be governed by rules. See *ibid.* 310.

but a duty we owe others not to take advantage of their compliance with the law.”<sup>43</sup> It is difficult to see how the argument from fair play can be reformulated so as to meet this point, and thereby be brought into compliance with the DAG condition.

Consider, finally, the argument from consent. This argument comes in many varieties, but one of the most powerful contemporary versions is advanced by Green himself.<sup>44</sup> Green of course recognizes that any obligations generated by consent will usually fail to meet condition (v) (the universality condition). But he maintains, plausibly, that an obligation based on consent will usually meet his other four conditions. Is this sufficient to establish that consent, to the extent that it has been given, justifies the power to enact the laws that, by hypothesis, there is an obligation to obey? Green argues that it is sufficient. This argument is a plausible one, because it is plausible to think that consent is, in essence, a promise to be bound by exercises of the very power to bind that is claimed by the state. Despite the plausibility of this argument, I nonetheless believe that it fails. Showing this is a complicated matter, and the details are accordingly left to another occasion. But the basic argument, which if correct applies to all “voluntaristic” arguments for a general obligation to obey the law, including the argument from fair play, is this. Any argument that offers to justify the state’s claimed moral power to impose obligations cannot be conditioned on such contingencies as whether or not citizens (or, more generally, subjects of the law) have engaged in a particular kind of act – for example, the acceptance of benefits, or the making of a promise. This is so because any obligations that arise from the exercise of the power will be categorical, and as such cannot be conditioned on this kind of contingency. Of course, it is plausible to think that the existence of a legitimate authority must be conditioned on the existence

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<sup>43</sup> Coleman, *supra* note [39], at 591.

<sup>44</sup> Green, *The Authority of the State*, *supra* note [16], at 158-87, 220-247. Green, like Simmons, conceives of consent as given voluntarily, one by one, by citizens or (or subjects) of existing states. His view is thus to be distinguished sharply from the social contract tradition, which I do not consider at all here.

of some empirically contingent factors, the most important of which is likely to be the effectiveness of the states's de facto authority. But, for reasons which have to do with the fact that the law's claim to authority is not only conceptually necessarily categorical but also morally necessarily categorical, neither the law's legitimate authority (where it exists) nor the obligations that result from its exercise can be conditioned on contingencies that involve voluntary acts by citizens.<sup>45</sup>

### **III. Authority, Power, Liability, and Obligation**

Why do we find Green's five conditions for the existence of an obligation to obey the law – more precisely, the first four, theoretical, conditions – intuitively appealing? I think the correct answer is that these conditions seem implicitly to characterize obligations that can plausibly be regarded as flowing from the exercise of a moral power, and the existence of a moral power is the conceptual and normative core of legitimate political authority. I will elaborate more fully on this

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<sup>45</sup> The argument from consent is different from the other arguments for a general obligation to obey the law we have been considering, in that it really is capable of giving rise to such an obligation. As noted in the text, Green's first four conditions are met, and the fifth condition, the universality condition, can at least in principle be met if, as an empirical matter, all subjects of the legal system just happen to give their consent. My argument is that a general obligation to obey that arose in this way still does not entail legitimate authority, for the reasons sketched in the text. As Arthur Ripstein put the point to me, the fact that the state had a moral power over every individual in the state because each one had promised to obey it would, under these circumstances, be a mere accident that had nothing to do with the univocal and categorical authority that the state claims over its citizens as a group. However, even if I am wrong about this, that does not call into question the understanding of legitimate authority that I develop in section VI. It would simply mean that legitimate authority can sometimes be justified in more than one way.

point shortly. For the moment, I will simply observe that, despite this intuitive appeal of the first four conditions, the discussion of the preceding section shows that even an argument that establishes the existence of a general obligation to obey the laws of a given state – i.e., an argument that meets all five of Green’s conditions, including the universality condition – does not necessarily establish that that state has the moral authority to enact those laws. In other words, a reverse entailment problem can arise even when the argument purporting to establish the existence of a general obligation to obey the law has impeccable conceptual credentials. This was the upshot of the hypothetical based on the argument that breaking the law may set a bad example. This suggests that, if we wish to determine whether or not the state’s claimed moral power to impose obligations is justified, we must look to arguments which attempt to establish that conclusion directly, and not by way of an intermediate conclusion to the effect that there is a (general) obligation to obey the law.

To begin, we need a more precise understanding of what a moral power is. One very plausible view takes something like the following form: One person *A* has a power to effect a certain kind of change in the normative situation of another person *B* if there is reason for regarding actions which *A* takes with the intention of effecting a change of the relevant kind as in fact effecting such a change, where the justification for so regarding *A*’s actions is the sufficiency of the value or desirability of enabling *A* to make this kind of normative change by means of this kind of act.<sup>46</sup> If this understanding of a power is along the right lines, notice first that any

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<sup>46</sup> Raz offers a characterization of a moral power that is roughly along these general lines. See Raz, *The Authority of Law*, supra note [5], at 18. I do not claim that this is the only possible characterization of a power. Matthew H. Kramer offers the following, quite different characterization in “Rights Without Trimmings,” in M. Kramer, N.E. Simmonds, and H. Steiner, eds., *A Debate Over Rights* (Oxford: Clarendon Press, 1998), 7 at 20: “Someone who holds a power can expand or reduce or otherwise modify, in particular ways, his own entitlements or those held by some other person(s).” This definition of a power does not explicitly incorporate



argument intended to justify the claim that *A* possesses a normative power over *B* must make essential reference to the value or desirability of *A*'s being able intentionally to change *B*'s

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the value-of-intentionality condition, and Kramer's exposition makes clear that he does not wish to incorporate any such condition. (Indeed, if I read him correctly, he may not even mean to incorporate a condition of intentionality.) Now there are obviously situations where person *A* can, either intentionally or unintentionally, change person *B*'s normative situation by means that do not possess value; perhaps, in some contexts, such an ability should even be recognized as a species of Hohfeldian power. For example, assuming a universal natural duty of mutual assistance, *A* can place *B* (along with himself, it might be noted) under a duty that is both onerous and unnecessary by tossing non-swimmer *C* into a river that is in close proximity to all three of them. (For purposes of the example, I am assuming that there is no general or systemic value in *A*'s possession of such a "power," although one can readily imagine particular situations in which there would be value in the result that *B* is placed under this new duty. For present purposes, we can ignore such complications.) But even if there is sometimes something to be said for characterizing *A*'s ability to change *B*'s normative situation in these kind of cases as a "power," such a conception of a power clearly has no place in a discussion of political authority. This is for the reason that, whatever else we might want to say about political authority, surely its ultimate point is precisely to allow one person intentionally to change the normative situation of another, where it is valuable that the former person have such a capacity with respect to the latter person. H.L.A. Hart clearly had a similar idea in mind when he wrote that "rules of change" and "rules of adjudication" – two types of power-conferring rules that, on Hart's view, figure prominently in the law – respectively allow for the intentional correction of the defects of unchangeability and inefficiency in what Hart called pre-legal systems of primary rules. Hart, *The Concept of Law*, supra note [25], at 92-96. Hart was clearly assuming, very plausibly, that the power intentionally to correct such defects in a normative system is a valuable thing. Note also that either type of correction will involve a change in the normative situation of at least some persons, even if this change consists only in the creation or removal of a liability.

normative situation by means of the specified kind of action.<sup>47</sup> Let me refer to this requirement as the “value-of-intentionality” condition, and to this conception of a legitimate moral power, and the associated conception of legitimate political authority, as the “value-based” conception. The general idea is simple but powerful: Legitimate moral authority can only exist if there is something sufficiently good or valuable about one person being able intentionally<sup>48</sup> to change the

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<sup>47</sup> There are further conditions which must be met if a moral power is to be translated into legitimate authority. Some of these conditions are helpfully discussed by David Enoch in his account of “robust reason-giving.” See David Enoch, “Authority and Reason-Giving,” forthcoming in *Philosophy and Phenomenological Research*. One of the conditions Enoch formulates is that in order to exercise a moral power to impose an obligation on *B*, *A* must not only intend to impose an obligation on *B*, but must also communicate this intention to *B*. Such a condition makes most sense in the case of face-to-face authority, such as that involved in the parent-child relationship. In the case of political authority, which is the subject of this article, the matter is more complicated, since it is a practical impossibility to ensure that a given law is actually communicated to each and every individual among the millions of individuals who are subject to the law. The condition becomes something like: The state must make an intense and good-faith effort to ensure that every law is communicated to every person affected by that law. Such a condition is clearly tightly bound up with the general publicity condition that is associated with the rule of law. These are complicated issues, and cannot be further considered here.

<sup>48</sup> What should we say about the situation where a lawmaker goes through the motions, as it were, of legislating, but does not actually have the appropriate intention? It seems to me that the right thing to say is analogous to the private law solution to such problems, which is that we attribute intentions based on objective manifestations of behavior. So the lawmaker has in fact made law, despite not possessing the appropriate intention. Still, the paradigm case, upon which such examples are parasitic, is that in which the appropriate intention is present. David Enoch correctly states that the case where the intention is present enjoys explanatory priority. Enoch, *ibid*. It is worth noticing that, since in the paradigmatic case it is a necessary condition of

normative situation of another person. This is one of the core claims of this article.

Before we proceed, there is an important point that should be emphasized. While the “Hohfeldian power” account of political legitimacy that I am developing obviously places the value-based conception of a moral power at the center of the account, the existence of a power is not all there is to the matter. To borrow a metaphor from property theorists, political legitimacy consists of a “bundle” of Hohfeldian relationships, the most fundamental of which is precisely the power of the state intentionally to change its subjects’ normative status. There may not be complete agreement among theorists about the other elements in the bundle, but various plausible suggestions have been made.<sup>49</sup> The upshot of this point is that the “Hohfeldian power” account of

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*A*’s exercising a power over *B* that *A* must actually intend to change *B*’s normative situation, *A* must presumably believe that she can change *B*’s normative situation in the relevant way. Of course her belief might well not be formulated under that description, using the terminology employed here. But *A* must have some belief along these general lines. If this is so then as a general matter one cannot possess a normative power without believing (under some appropriate description) that one possesses it, and this suggests in turn that, at least for someone who accepts the very plausible thought that the concept of law is closely bound up with the concept of a normative power, Raz is correct in his view that law by its very nature claims for itself moral authority, meaning a moral power to impose obligations.

<sup>49</sup> For example, David Copp argues that “the legitimacy of a state would consist in its having the [following] cluster of Hohfeldian rights”: “First, a legitimate state would have a sphere of privilege within which to enact and enforce laws applying to the residents of its territory. Second, a legitimate state would have the power to put its residents under a pro tanto duty to do something by enacting a law that requires its residents to do that thing, provided that the law falls within its sphere of privilege and is otherwise morally innocent. Third, a legitimate state would have the privilege to control access to its territory . . . . Fourth, a legitimate state would have a [claim-right] against other states that they not interfere with its governing its territory. Fifth, a

political legitimacy is much more subtle and nuanced than might appear if we focused on the moral power alone.

I will have more to say about the value-based conception throughout the remainder of the article. Here I simply wish to make the following two important points. First, the value-based conception is a conception in the sense that it is meant to render both as explicit and as precise as possible the content of the concept of a legitimate moral power (and, therefore, to do the same for the concept of legitimate political authority). It is not meant to be a substantive theory which establishes, say, that under such and such conditions, a state or government possesses moral legitimacy. It does not even presuppose that such a theory exists. Second, the idea of “sufficient value” which is associated with the value-based conception is, strictly speaking, concerned with the value of the possession by the power-holder of the capacity to intentionally change the normative situation of others, and not with, say, the value of states of affairs that might result from the exercise of that capacity. Of course, one would expect that instrumentally-oriented substantive theories of legitimate political authority would discern a systematic link between the one kind of value and the other, and the substantive theory I will sketch in section VI will be of

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legitimate state would have an immunity to having any of these rights extinguished by any action of any other state or by any other person.” David Copp, “The Idea of a Legitimate State”

*Philosophy and Public Affairs* 28 (1999), 3, at 44-45. I am not sure that Copp’s analysis is correct in its entirety, but, generally speaking, I think he is on the right track. An interesting question that arises, but that cannot be properly dealt with here, concerns to whom a duty that is created by the exercise of the relevant power is owed. Some writers think it is owed to the state itself, or to the legislature or lawmaker, but David Enoch argues persuasively that the duty is owed to one’s fellow citizens (which, incidentally, is Dworkin’s position on legal obligation). See Enoch, “Authority and Reason-Giving,” *supra* note [47]. Elsewhere I have argued that the obligation is owed to the community as a whole, which I think comes to much the same thing. See Perry, “Law and Obligation,” *supra* note [7], at 282 n.36.

this kind. But, as we shall see, substantive theories which do not depend on such a link are at least conceivable.<sup>50</sup>

The value-based conception of a moral power, together with the value-of-intentionality requirement that it incorporates, helps to explain the intuitive appeal of Green's first four conditions for the existence of an obligation to obey the law. The point is obvious in the case of condition (i), the morality condition, and condition (iii), the bindingness condition, since the result of exercising a legitimate moral power to impose obligations must be a morally binding obligation. Condition (ii), the content-independence or DAG condition, holds, it will be recalled, that a moral obligation to obey a legal directive which arises by virtue of the directive's status as

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<sup>50</sup> The example of promising should help to make this point clear. A special case of the value-based conception of a moral power as I characterized it in the text concerns the circumstance where *A* and *B* are the same person, i.e., the case of moral powers to change one's own normative situation. The most important example is the power to obligate oneself by making a promise. The value-based conception of a power directs us to ask why there is or might be value in a person's having the capacity intentionally to change his own normative situation in this way. Not all theories of promising can be understood as answers to this question, but Raz's theory provides an insightful and nuanced direct response. See Raz, *The Morality of Freedom*, supra note [2], 86-88. Raz argues that there are two types of value associated with the capacity, as he puts it, to impose moral demands on oneself. One is the instrumental value "of forming and pursuing projects that give shape and content to one's life." But the other type of value is concerned with the fact that the very capacity to obligate oneself to another is partially constitutive of the value of certain kinds of human relationships. Raz does not use this term, but I take the point to be that the capacity to impose moral demands on oneself can have intrinsic moral value. As we shall see in section VI, it is possible to make arguments – by no means directly analogous to Raz's argument about promising – that the capacity intentionally to impose obligations on others can also have intrinsic value.

law must take the existence of the directive as the ground or part of the ground of the obligation, but must not make essential reference to the independent merits of doing X. This condition becomes both intelligible and more precise when it is realized that a morally binding directive only comes into existence as the result of the intentional action of another person, where by hypothesis there is value in that person's being able intentionally to change the normative situation of someone else by issuing such directives; what matters, morally speaking, is the will of the power-holder, and not the content (meaning the independent merits) of the directive he or she issues. Condition (iv) is the particularity condition, which states that an obligation to obey the law must arise only for the directives of a citizen's (or subject's) own state, and not for the directives of other states. Stated simply in terms of obligation, this condition is, as we saw in section II, rather amorphous, and it is difficult to determine how one would go about establishing that the obligation is restricted in the stated manner. But once we bring the idea of a moral power into the picture, the general character of the particularity condition comes into focus. A moral power is a normative relationship between the power-holder and those persons over whom the power is held, and, as a conceptual matter, at least, there is no reason why the latter cannot be a limited group, such as the citizens of a given state. It is relevant here that states generally only claim authority over their own citizens (and other persons who happen to be within their territory). Of course a moral argument is required to establish both the existence of the power and its restriction to a particular group, but the general character of the particularity condition is nonetheless relatively clear.

Most of the standard theories that are discussed as possible candidates for justifying or helping to justify the existence of a general obligation to obey the law cannot be said, even when understood as an intermediate conclusion on the way to establishing the existence of legitimate moral authority, to meet the value-of-intentionality condition.<sup>51</sup> The natural duty to support and

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<sup>51</sup> John Finnis' argument for the conditions under which authority is legitimate is, it is worth mentioning, one of the few contemporary theories which explicitly attempts to meet the

comply with just institutions fails on its face to meet the condition simply because it is framed in terms of a natural duty, i.e., a duty that holds among all human beings, and not in terms of a restricted moral power. The argument from fair play fails to meet the condition because it is not the fact that the relevant directives were issued in accordance with a legitimate moral power that matters, but rather the fact that other people have obeyed the directives (however they came into existence) and one has, under certain circumstances, a duty to reciprocate.<sup>52</sup> Dworkin's argument fails to meet the condition if only because the normative status within his theory of enacted directives, i.e. the normative status of directives issued one by one by a de facto authority, is quite unclear.<sup>53</sup> Although the argument from consent raises, as was earlier noted, complex issues that

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“value of intentionality” condition. Finnis's argument – more accurately, the type of argument which Finnis offers – will be considered in section VI below.

<sup>52</sup> It is worth pointing out that Simmons, the leading interpreter and exponent of the argument from fair play, does not think that the argument even requires rules, let alone authoritatively enacted rules, to have effect. See *supra* note [42].

<sup>53</sup> Dworkin explicitly characterizes “the classical problem of the legitimacy of coercive power” as essentially equivalent to the problem of whether “citizens have genuine moral obligations just in virtue of law” (where he is clearly using the term “coercive power” not in the sense of a moral power, but rather in the sense of the coercive use of force.) Dworkin, *Law's Empire*, *supra* note [20] at 91. He then adds that “[a] state is legitimate if its constitutional structure and its practices are such that its citizens have a general obligation to obey political decisions that purport to impose duties on them.” *Ibid.* This all sounds quite traditional, and indeed Dworkin proceeds to argue for the superiority of his theory of a general obligation to obey the law over the natural duty theory, the fair play theory, and so on. However, the traditional ring of this aspect of his account is very much in tension with his account as a whole, which has very little to say about the theoretical nature of those “political decisions” – are they the result of the exercise of a moral power, for example – but rather finds law, and the general obligation to obey the law, in a holistic interpretation of legal and political institutions as a whole, where individual

cannot be fully dealt with here, one can nonetheless make the initial observation that what seems primarily to matter for consent theories is the intention of the person giving consent rather than the intention of the holder of a moral power.

Let me turn at this point to another feature of moral powers. I will approach the point I wish to make indirectly, by initially speaking of the terms “right to rule” and “legitimacy” which are so commonly employed, often interchangeably, in discussions of political authority and political obligation. Many writers have suggested that the right to rule and the duty to obey are correlates of some kind, and this is a line of thought that might well be regarded as pointing to the conclusion which, in section II, we saw to be potentially problematic, namely, that not only does the right to rule entail a general duty to obey, but a general duty to obey entails a right to rule. The concern, in other words, is with the “reverse entailment” problem. Simmons, for example, has written that “legitimacy is . . . the logical correlate of the (defeasible) individual obligation to

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“political decisions” do not directly give rise to particular obligations but are simply one element of the social practices that are to be interpreted holistically. His theory is thus ultimately of a quite different character from, say, the principle of fair play, which, in the hands of Simmons, its leading exponent, is meant to demonstrate that if the principle of fair play can establish a general (or partial) obligation on the part of a government’s subjects to obey its laws, then the government has over those subjects a correspondingly general (or partial) authority, in the sense of a legitimate moral power, where there is supposed to be a direct correlation between each exercise of the power and the moral obligatoriness of the particular directive that is thereby produced. For Dworkin, to establish a general obligation to obey the law, in accordance with his theory of law as integrity, simply is, subject to minor qualifications not relevant here, to establish the legitimacy of the state. For Simmons, on the other hand, to establish a general obligation to obey the law, in accordance with his voluntaristic political theory, is an intermediate step on the way to establishing the legitimacy of the state in the sense of a moral power. (Whether Simmons’ view lives up to its claims is another issue, of course, which I will discuss in a moment.)



comply with the lawfully imposed duties that flow from the legitimate institution's processes."<sup>54</sup> One might think that Simmons can avoid the reverse entailment problem by arguing that he has limited the "obligation" that is the "logical correlate" of legitimacy to a matter of compliance "with the lawfully imposed duties that flow from the legitimate institution's processes." But this manoeuvre does not help him escape the reverse entailment problem, at least if his theory is to avoid being completely vacuous.

Note that, in his formulation, Simmons speaks of "an obligation to comply with . . . lawfully imposed duties . . .".<sup>55</sup> Legitimacy, for Simmons, is clearly a moral concept that has moral force, and one would therefore expect that legitimacy's correlate, obligation, would likewise be a moral concept with moral force. But this only makes sense if the phrase "the . . . duties that flow from the legitimate institution's processes" is being used descriptively, in a sense more or less synonymous with the way I have been using the term "directive" throughout this article.<sup>56</sup> The important moral question for Simmons then becomes: When does a duty in his sense – i.e., a morally inert directive – take on morally obligatory force? Simmons has an answer to this question, which is that a duty/directive becomes obligatory for individuals when they perform certain voluntaristic acts such as consent, or acceptance of benefits under the principle of fair play. But the moral principles of consent and fair play have nothing to do with the processes that generate directives, and therefore cannot reasonably be regarded as the moral basis of legitimacy (the right to rule). Thus Simmons' formulation does in fact give rise to a version of

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<sup>54</sup> Simmons, *Justification and Legitimacy*, supra note [11], at 155.

<sup>55</sup> Recall that, in this article, I am using the terms "duty" and "obligation" synonymously. See supra note [8]. Simmons, in the passage under discussion in the text, is clearly assigning the terms different meanings.

<sup>56</sup> At the beginning of section I, I defined a "directive" as "the product of the exercise of a claimed power to impose obligations." A claimed power is not necessarily morally legitimate, and hence the definition is descriptive, not normative or moral, in character.

the reverse entailment problem. For his theory to work, not only must legitimacy entail an obligation to obey, but an obligation to obey, generated by the voluntaristic processes that he permits, must entail legitimacy, i.e., legitimate authority. What else could it mean to say that legitimacy and the obligation to obey are “logical correlates”? But this latter entailment cannot be true if the reasons for regarding a directive as obligatory are completely independent of whether or not there is a legitimate moral power that was exercised so as to produce that directive.

It might yet be argued on Simmons’ behalf that he does not conceive of legitimacy as a moral power, but rather as a claim-right, so that the claim-right to rule which constitutes legitimacy would be a Hohfeldian correlate of a moral obligation to obey. This proposition seems completely empty and uninformative about the nature of political authority, but in any event, as I noted in section II, the reverse entailment problem can arise even when legitimate authority is understood as a claim-right. However, I believe that the best interpretation of what Simmons has in mind when he speaks of legitimacy is in fact a Hohfeldian power,<sup>57</sup> and I will

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<sup>57</sup> As far as I can tell, Simmons does not use the common phrase “right to rule,” but instead speaks always of “legitimacy.” He defines “legitimacy” as “the exclusive moral right to impose on some group of persons binding moral duties, to be obeyed by those persons, and to enforce those duties coercively.” Simmons, *Justification and Legitimacy*, supra note [11], at 155. This definition in fact refers to three different rights, and Simmons simply does not say in what Hohfeldian sense he understands any of them. It seems to me that the first right, “the exclusive right to impose on [others] binding moral duties,” is dynamic in the way that only a power can be; it is no more and no less than a power to change other persons’ normative situation in a certain specified way. We should not be misled by the fact that the specified way involves imposing an obligation and that the Hohfeldian correlate of an obligation is a claim-right, since, as I have emphasized several times, in the political context legitimate authority consists of a legitimate power to change the normative situation of others in any of a myriad number of ways, for example, by creating rights, immunities, liabilities, new powers, etc. In Perry, “Law and

assume as much from now on. That a right to rule should be understood as a Hohfeldian power is the explicit view of Raz and Green, who both nonetheless agree with Simmons that there is a correlation of some special kind between a legitimate power to obligate and the genuine moral obligations that result from such a power's exercise. Raz states that "[t]he obligation to obey a person which is commonly regarded as entailed by the assertion that he has legitimate authority is nothing but the imputation to him of a power to bind."<sup>58</sup> Green rightly recognizes that the true Hohfeldian correlate of a power is a liability, not an obligation,<sup>59</sup> but dismisses this as "a somewhat technical point," going on to write that "the correlation between a right to rule [meaning a legitimate moral power] and a duty to obey is distinctive only of the case of political power."

Whatever Simmons and Raz might have had in mind when they wrote that legitimacy (or a right to rule), meaning legitimate political authority understood as a moral power, is in some sense the correlate of lawfully imposed genuine obligations or duties, they are simply mistaken if they took this to be a correlation in Hohfeld's sense. As we have just seen, the true Hohfeldian correlate of a power to impose duties is not a duty but, rather, a liability, meaning in this context a liability to be subjected to duties. Focusing, as most writers in this area tend to do, on a power to

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Obligation," supra note [7] at 284-86, I argue that a complex power of this kind cannot be reduced to a simple power to impose obligations.

<sup>58</sup> See, Raz, *The Morality of Freedom* supra note [2], at 24. Raz continues the passage quoted in the text as follows: "For the obligation to obey is an obligation to obey if and when the authority commands, and this is the same as a power or capacity in the authority to issue valid or binding directives." This is a rather odd way to characterize the correlation or special relationship between a power to obligate and the resulting obligation, since it asserts an identity relation of some kind between the two. This seems implausible.

<sup>59</sup> Green, *The Authority of the State*, supra note [16], at 235. See also Perry, *Law and Obligation*, supra note [7], at 272-75.

impose duties, as opposed to a power to change the normative situation of others in almost any conceivable way<sup>60</sup> – by creating a claim-right, say, or a permission, or a new power, or an immunity – perhaps tends to obscure this point, since the result of properly exercising a power to impose duties is of course a duty. That the duty comes into existence by reason of the fact that one is under a genuine liability to be subjected to duties might at first seem to have no implications for substantive political philosophy, but I shall argue that that is not so. At the very least, the fact that the Hohfeldian correlate of a power is not a duty but rather a liability should heighten our suspicion that a general obligation to obey the law does not, in and of itself, entail political legitimacy; it should, in other words, heighten our awareness that reverse entailment problems may be lurking.

Why is the fact that the true Hohfeldian correlate of a moral power to impose duties is not itself a duty, but rather a liability to be subjected to duties, not simply a technical point that has no substantive implications? If the correlate of a power to impose duties were in fact a duty, it would make sense to think that the power only exists if the correlative duty exists, which could only be the case if the power had in fact been exercised. But once we recognize that the Hohfeldian correlate of a power to impose duties is a liability, not a duty, it is easy to see that, in principle, the power can exist without ever having been exercised: The normative status of the person over whom the power is held is that he or she is liable to be subjected to a duty, not that he or she is in fact under an existing duty. In fact we can make a stronger point still, which is that the existence of the power is, in the sense just described, necessarily a prospective matter. It is of course true that a lawmaker can, either explicitly or implicitly, postpone the time at which a law comes into effect, or else condition its taking effect on the occurrence of some future event. But, leaving aside the possibility of such qualifications, what should the default rule be concerning the time that a given directive comes to have normative force? Given that both the power to impose the obligation, and, necessarily, the correlative liability to be subject to the obligation, must exist at

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See *supra* note [57].

the time that the directive is enacted, what other nonarbitrary default rule could there be except that the directive takes effect at the very moment it is enacted or signed into law? From now on I will assume that any argument attempting directly to justify a moral power to impose obligations must not violate this understanding of the default rule concerning prospectivity, and I will refer to this constraint on such arguments as “the prospectivity condition.”<sup>61</sup>

The prospectivity condition has very significant implications that may not be immediately apparent. It does not, for example, simply apply when a state first comes into being, at a point in time when the nascent state has not yet issued any directives. The condition applies, barring any qualification imposed by the lawmaker of the kind discussed in the preceding paragraph, to each and every directive issued by the state. The normal state of affairs is that the pre-existing moral liability to be subjected to obligations is triggered at the moment that the moral power is exercised, i.e. at the moment when the relevant directive is enacted or signed into law. Thus any argument for the conclusion that a given state possesses legitimate moral authority which depends on facts that only come into being at a time subsequent to the enactment of laws must be treated as suspect. This is true whether the argument is framed directly in terms of legitimate authority, or in terms of an intermediate conclusion that there is a general obligation to obey the law. For example, Dworkin’s argument for a general obligation to obey the law is based on the condition

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<sup>61</sup> It is worth mentioning that we generally think it is possible for legal directives, if suitably qualified, to have retrospective as well as prospective effect. Of course we also think that, generally speaking, retrospective lawmaking is a very bad thing, because of rule of law considerations, and that laws made in this way are in some important sense defective. Is it truly possible for a law to be retroactive, in the sense that it can actually change the past normative status of persons? I am not sure, but I doubt it. Either way, I do not think the possibility of a law’s having retrospective effect can affect anything I have said in the text about the prospectivity condition, which is, after all, a matter of default. It only takes effect when the lawmaker has not made clear that his or her intention is, say, to pass a law with retrospective effect.

that the existing laws of a state can be interpreted, as a whole, to meet the test of integrity. But the prospectivity condition insists that the existence of legitimate authority cannot be subject to an after-the-fact assessment of the success of many different laws, passed at many different times, in meeting a certain content-based restriction, particularly when that assessment is, as in the case of Dworkin's theory, a holistic one that applies to all of the state's laws simultaneously. Or consider the argument from fair play. The argument depends on the acceptance of benefits associated with a certain state of affairs, namely, the compliance of other persons with the rules, that normally can only come into existence, where it does come into existence at all, at a time after the rules have been enacted. Because this is so, the argument cannot plausibly be regarded as justifying the existence of a moral power to issue morally binding rules in the first place. This is, stated at the most fundamental level, the reason why Simmons' proposition about legitimacy and the obligation to obey the law being "logical correlates" gives rise, at least for his particular substantive theory, to a version of the reverse entailment problem.

It might be argued that the prospectivity condition is itself suspect because it is almost universally agreed that one necessary condition of a state's possessing legitimate political authority is that the state must be a de facto authority, which means, among other things, that it is effective, which means in turn that persons will generally obey its directives. Effectiveness, the argument would continue, can only be established retrospectively, by examining whether or not people do, in fact, generally obey the state's directives. One way or another, the argument would conclude, a justification for the existence of a state's claimed power must therefore be establishable retrospectively, by reference to a condition that can only possibly come into existence at a point in time after at least some exercises of the state's claimed moral power have taken place. In response to this objection, let me say first that it is true, on any plausible view, that effectiveness will indeed be one condition that a state must meet if it is actually to possess the moral power to impose obligations that it claims for itself. However, effectiveness is not properly understood by reference to future acquiescence as such, but rather by reference to an expectation of future acquiescence. More specifically, what effectiveness requires is that at the moment in

time that a claimed moral power to impose obligations is purportedly exercised, there must exist a general and generally justified expectation that the exercise of the power will be followed by widespread future acquiescence, i.e., by general obedience. It is true that evidentiary concerns might well generally lead us, as a practical matter, to assess a state's effectiveness by examining its actual track record. The strongest evidence that a state's directives will be obeyed in the future might well be the fact that, generally speaking, its directives have been obeyed in the past. But it is crucial to recognize that this backward-looking consideration is just a matter of practical evidentiary concern, and as such does not tell us anything significant about the true theoretical character of the effectiveness requirement.

By way of illustrating the argument of the preceding paragraph, consider the following statement by John Finnis: “[T]he sheer fact that virtually everybody will acquiesce in somebody's say-so is the presumptively necessary and defeasibly sufficient condition for the normative judgment that that person has (i.e. is justified in exercising) authority in that community.”<sup>62</sup> I believe that a fair reading of Finnis's general discussion of this statement makes clear that he understands effectiveness not as a matter of future acquiescence as such, but rather as a matter of present expectation of future acquiescence.<sup>63</sup> It is worth mentioning here two further points about Finnis' theory of legitimate political authority. First, as I believe the quoted passage makes clear, Finnis is offering an argument which claims directly to justify the conclusion that de facto authorities possess legitimate moral authority; it is not an argument based on a mediating conclusion that there is a general moral obligation to obey the law. To be sure, Finnis accepts that central cases of legal systems do give rise to a prima facie general moral obligation to obey the

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<sup>62</sup> John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 2<sup>nd</sup> ed., 2011), 250 (emphasis in original).

<sup>63</sup> See, e.g., *ibid.* at 249: “[T]he required state of facts is this: that in the circumstances the say-so of this person or body or configuration of persons probably will be, by and large, complied with and acted upon. . .” (emphasis added).

law, but this is a consequence of, not the basis for, his view about the nature of legitimate political authority. Second, as I believe the quoted passage also makes clear, for Finnis, effectiveness is not just a condition that a state must meet in order to possess legitimate authority; it is the very core of the argument for possession of legitimate authority. That is why effectiveness is said to be not only a (presumptively) necessary condition for the possession of legitimate political authority, but a (defeasibly) sufficient condition as well. It is an interesting question whether effectiveness is in effect a third condition, in addition to the value-of-intentionality and prospectivity conditions, which partly defines the very nature of legitimate authority. I take it that Finnis regards effectiveness as a – indeed, the – defining feature of legitimate political authority, whereas Raz believes that it is an extrinsic factor which, as a practical and empirical matter, will almost inevitably figure in most substantive theories of political authority, but that it is not an element of the very concept of such authority. Needless to say this is a moral and not a purely conceptual question, but not one that can be taken up here.

Perhaps it might be argued that one or more of the standard arguments for an obligation to obey the law can be understood in terms similar to those in which I discussed effectiveness. Thus it might be suggested that the reasonable prospect that most people will comply with the law in the future creates, according to the terms of the fair play argument, an obligation for me now, at the time when the law is enacted. This is an intelligible suggestion, but as a matter of first-order moral theory it is very implausible. The core of the fair play argument is the idea that I have an obligation because I have accepted benefits which, in the case of law, depend on other persons' obeying the law. But it is difficult to see how I can accept benefits which have not yet come into existence. I believe that similar objections will befall all of the standard arguments for the existence of a general obligation to obey the law.



#### IV. **Two Problems of Political Authority**<sup>64</sup>

In sections V and VI below, I discuss Joseph Raz's influential service conception of authority, and suggest that it falls victim to a number of the theoretical pitfalls that were discussed in sections II and III above. Before getting to the details of Raz's theory, however, it will first be helpful to distinguish between two different problems of political authority, both of which have figured prominently in Raz's work. The first problem is the fundamental question of whether or not and under what circumstances states ever in fact possess the extensive normative powers which they claim for themselves to be able to change the normative situation of their subjects. The concern, in other words, is with the question of whether or not and to what extent the claim of de facto authorities to possess legitimate authority is justified. Let me call this the problem of justification.<sup>65</sup> Since the claim that states make to possess legitimate political authority is moral in nature, the problem of justification is a moral problem, and attempts to address it must have recourse to substantive moral argument. The upshot of the discussion in section II is that this problem must be addressed directly, and not via the mediating conclusion that the theory does, or would under certain circumstances, give rise to a general obligation to obey the law. The upshot of section III is that proposed solutions to the justification problem must meet the prospectivity and value-of-intentionality conditions.

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<sup>64</sup> In this and the following two sections I draw on, and greatly expand, arguments that I first offered in Stephen Perry, "Two Problems of Political Authority," *American Philosophical Association Newsletter on Philosophy of Law*, 6(2) (2007), 31.

<sup>65</sup> Note that I am not using the term "justification" in the same sense as Simmons when he distinguishes between "justification" and "legitimacy." See *supra* note [11] on Simmons' distinction. I argue there that while the distinction itself is helpful, Simmons' definition of the term "justification" is idiosyncratic. In contemporary usage, "justified" authority and "legitimate" authority seem to be treated as virtually synonymous terms. Or, if not exactly synonymous, they are treated as terms which are systematically related. See further note [11].

The second problem of political authority concerns the question of whether or not an individual can ever be justified in subjecting his or her will to that of another person. Let me call this the subjection problem. This too is a moral problem, at least insofar as the issue is taken to be one of maintaining moral autonomy or making important decisions in one's life in accordance with one's own independent judgment.<sup>66</sup>

The two problems of political authority that I have identified are clearly related, since a response to the justification problem which purports to show that political authority can under some circumstances be legitimate must show that, at least under those circumstances, it is justified to subject one's will to that of another. But the two problems are nonetheless distinct. A demonstration that one is justified, in appropriate circumstances, in subjecting one's will to that of another is a necessary condition of the legitimacy of political authority, but there is no reason to think that it is a sufficient condition. Beyond that, the problem of subjection arises in many contexts besides that of political authority. According to one understanding, the problem arises whenever one is faced with a directive, a command, or some similar intentional attempt to change one's normative situation, whether this occurs in a political or a nonpolitical context. According to another, broader understanding, the problem arises in the circumstances just described, but also whenever one is faced with a demand or request by another person that one behave in a certain way. Demands are not generally intended to be exercises of a normative power, and requests

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<sup>66</sup> See, particularly Wolff, *In Defense of Anarchism*, supra note [23], at 3-19. Scott Shapiro offers a very illuminating discussion of issues raised by both of these problems of authority in Scott J. Shapiro, "Authority," in J. Coleman and S. Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002), 382. Shapiro does not use my term "subjection problem," but writes, rather, of the "paradoxes of authority." But the issues raised by what he calls the paradoxes of authority overlap extensively with the issues raised by what I am calling the subjection problem.

never are. According to another, still broader understanding of the subjection problem, it arises whenever one is faced with the possibility of relinquishing control over some aspect of one's life by acting according to someone else's view about what one ought to do, rather than according to one's own view. On this – the broadest – understanding, the subjection problem arises, for example, for a person who more or less automatically relies on the advice of a friend, or on the general recommendations of a self-help book, about what to do in a particular kind of situation, rather than on his or her own judgment. In other words, the subjection problem understood in this third sense can arise even when there is no intentional attempt, of the kind involved in commands, directives, demands, and requests, to motivate one to act in a certain way; it is enough to trigger the problem that one blindly follows another's advice or even another's impersonally expressed views about how persons ought in general to behave in some specified type of circumstance.

The best known and most influential discussion of what I have been calling the subjection problem is, at least in the political context, that of Robert Paul Wolff.<sup>67</sup> Wolff maintains, following Kant, that “moral autonomy is a combination of freedom and responsibility,” and that the autonomous person, “insofar as he is autonomous, is not subject to the will of another.”<sup>68</sup> Wolff further writes that autonomy involves both “a submission to laws one has made for oneself” and “the duty of attempting to ascertain what is right.”<sup>69</sup> The autonomous person will not necessarily refuse to do what others either command or advise, but he will deliberate about the matter first. “He may listen to the advice of others, but he makes it his own by determining for himself whether it is good advice.”<sup>70</sup> Similarly, the autonomous person will not necessarily refuse to do as the law requires, “but he will deny that he that he has a duty to obey the laws of

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<sup>67</sup> Wolff, *In Defense of Anarchism*, supra note [23]. The term “subjection problem” is mine, not Wolff’s.

<sup>68</sup> Ibid. 14.

<sup>69</sup> Ibid. 14, 13.

<sup>70</sup> Ibid. 13.

the state simply because they are the laws.”<sup>71</sup> Using the terminology I adopted in section II, the autonomous person ought to conform his behavior with the law when he determines that, all things considered, this is the right thing to do, but he is never justified in complying with the law. Wolff views political authority essentially as Raz does, namely, as “the right to command, and, correlatively, the right to be obeyed.”<sup>72</sup> While he does not use the term “power” in the sense that I have been using it in this paper, he clearly regards the “right to command” as involving a power to impose obligations. Wolff’s ultimate conclusion, not surprisingly, is that “there can be no resolution of the conflict between the autonomy of the individual and the putative authority of the state.”<sup>73</sup> The state’s claim to legitimate authority is, quite simply, impossible to justify.

I earlier phrased the subjection problem as the question of whether or not an individual can ever be justified in subjecting his or her will to that of another person. To put this question in Hohfeldian terms, the question is whether or not the individual is ever permitted, or at liberty, to subject his or her will to that of another person.<sup>74</sup> Wolff thinks that one is never permitted to subject one’s will to another, but he also clearly thinks – this would be true a fortiori – that one never has a duty to subject to one’s will to that of another. But if one did not take as strong a line on autonomy as Wolff does, and hence thought that it is at least sometimes justified, or permitted, to subject one’s will to that of another, one might also ask, is one ever under a duty to subject

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<sup>71</sup> Ibid. 18 (emphasis in original).

<sup>72</sup> Ibid. 4.

<sup>73</sup> Ibid. 18.

<sup>74</sup> Hohfeldian terminology might not seem completely appropriate here, because the Hohfeldian correlate of a permission is a no-right. If Wolff is correct that one is not ever permitted to subject one’s will to another, this is not because anyone else has a right. Similarly, when Wolff writes that everyone always has a duty to deliberate and, after deliberating, to do what he or she thinks is the best thing to do overall, this is not a duty which is owed to anyone else. If the duty is owed to anyone, it is owed to oneself.

one's will to that of another? This is still a version of the subjection problem, but it is a version of the problem that is formulated in mandatory rather than permissive terms. As we shall see, this appears to be the version of the subjection problem with which Raz is most concerned.

## V. Raz's Service Conception of Authority

Raz's deservedly famous service conception of authority appears to have been offered, at least in its early formulations, as a response to both the justification problem and the subjection problem. In this section, I will argue that while the service conception does indeed offer an important insight about when one is either permitted or under a duty to subject one's will to that of another (the subjection problem), and to that extent addresses an important dimension of the justification problem, it nonetheless does not succeed as a comprehensive response to the justification problem, meaning it does not offer a comprehensive account of the conditions that a de facto political authority must meet in order to possess the legitimate moral authority that it claims for itself. The difficulty, in brief, is that even if the service conception correctly identifies many of the situations where one is justified in subjecting one's will to that of another, and even if it gives rise, in many situations, to an obligation to obey the other person, it does so in a way that does not depend on whether or not the other has exercised or purported to exercise a moral power to impose a binding obligation. But the possession of a moral power to change the normative situation of another is, by Raz's own lights, the heart of legitimate authority. If the service conception does not directly address the question of whether or not the possession of such a power is justified, then it has not truly come to grips with the problem of justifying political authority. The upshot is that the service conception both suffers from a version of the reverse entailment problem and also fails to meet the value-of-intentionality condition.

It is a further question whether or not any obligations to which the service conception might give rise in the political context are capable of meeting the five conditions for the existence of a general obligation to obey the law that were discussed in section II above. This issue will be

briefly discussed later.

The heart of the service conception is the normal justification thesis (the NJT), which in Raz's early formulations asserted that "the normal way to establish that one person has authority over another person," and hence the normal way to show that the latter "should acknowledge the authoritative force of [the former's] directives," is to show that the second person will in general do better in complying with the reasons that apply to him "if he accepts [the first person's] directives as authoritatively binding and tries to follow them, rather than trying to follow the reasons that apply to him directly."<sup>75</sup> At this stage, three points should be noted about the NJT. First, it is explicitly offered as a full-fledged response to the justification problem: To "establish" that one person has authority over another person can only mean to offer a substantive justification for the conclusion – explicitly acknowledged by Raz to be moral in nature – that the one has legitimate authority over the other.<sup>76</sup> Second, Raz also offers the NJT as a response to the

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<sup>75</sup> Raz, *The Morality of Freedom*, supra note [2], at 53. As Scott Hershovitz has pointed out, the terminology Raz uses here is confusingly different from the terminology which he uses in *Practical Reason and Norms*, and which I adopted in section II above. See Scott Hershovitz, "Legitimacy, Democracy, and Razian Authority," *Legal Theory* 9 (2003), 201, at 206-07. To put the NJT in the terminology of section II, we should say that one person has a duty to comply with another's directives when by doing so the former will better conform with reasons that apply to her than if she tries to act on her own judgment. Notice that this seems to demand more of individuals than the law does, since, as was discussed in section II, it is ordinarily sufficient to obey the law that one's conduct merely conform with the law, as opposed to comply with it. Having pointed out this terminological issue, in the remainder of this section I will for the most part follow Raz's usage in *The Morality of Freedom*.

<sup>76</sup> See *The Morality of Freedom*, supra note [2], at 63: "The service conception is a normative doctrine about the conditions under which authority is legitimate and the manner in which authorities should conduct themselves."

subjection problem.<sup>77</sup> Roughly speaking, the general idea is that, if one will better comply with right reason in a specified set of circumstances by allowing oneself to be guided by the judgment of another rather than by trying to act according according to one's own judgment about what ought to be done, then one is justified in subjecting one's will to that of the other. This is the core of his response to Wolff's reason-based anarchist challenge. In effect, Raz fights reason with reason. Third, the NJT is clearly intended by Raz to be understood as a necessary and core element of the very concept of practical (and therefore of political) authority, much as I argued in section III for a similar conclusion regarding the value-based conception of a moral power.<sup>78</sup> Since we have competing conceptions of the core element of the concept of legitimate authority, I will refer to this issue as "the conceptual problem." This is, in effect, a third problem of political authority, in addition to the justification and subjection problems. Needless to say, the arguments required to resolve the conceptual problem will not be purely conceptual; they will in no small part be moral,<sup>79</sup> as we shall see in discussions below of the debate concerning whether the value-based conception or the NJT best captures the most fundamental aspects of the concept of legitimate political authority.

Given the three points enumerated in the preceding paragraph, Raz is clearly asking a great deal of the NJT. For the moment, my concern is with the NJT understood as a full-fledged response to the justification problem. The difficulty that the NJT faces in justifying legitimate

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<sup>77</sup> See *ibid.* 38-42, where Raz discusses the problem of "surrendering one's judgment."

<sup>78</sup> See *ibid.* 64, where Raz states that he is developing "a normative-explanatory account of the core notion of authority."

<sup>79</sup> This is in keeping with Raz's idea that his own theory is "a normative-explanatory account of the core notion of authority." See preceding note. As Raz states, in this area of inquiry "there is an interdependence between normative and conceptual argument." *Ibid.* 63. In my view, "normative" here can only mean "moral."

authority can be brought out by considering one of the two main types of case to which Raz says that it has application, namely, cases in which the person issuing the directive has greater expertise than the person to whom the directive is issued. (The other type of case, which involves situations where the person issuing directives is in a position to achieve valuable coordination among the activities of several people, will be discussed in section VI.) To avoid unnecessary complications, I will focus on a case where the “background reasons” that apply to the person to whom directives have been issued are both moral in character and constitute categorical reasons, where a categorical reason is one that applies to the person independently of his or her particular goals and aspirations.<sup>80</sup> Suppose, for example, that the issue is how safely to transport a certain dangerous substance, where transporting the substance poses potentially serious risks of harm to other persons. The relevant background reasons that apply to transporters of the substance are reasons to avoid creating such risks for others, and are therefore categorical in nature. Suppose that a given governmental agency in fact knows much more about the transportation of this substance than I do, and that I will therefore do much better in complying with the background reasons of safety that apply to me if I obey the agency’s directives than if I try to decide for myself how the substance ought to be transported. The general idea of the NJT is that this fact gives me reason to comply with the directives the agency has issued, and that since it would be “double-counting” if I were also to try to take account of the background reasons directly, I should treat the directives as “preempting” those background reasons.<sup>81</sup> The fact that the

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<sup>80</sup> On categorical reasons see John Gardner and Timothy Macklem, “Reasons,” in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, supra note [66] 440, at 465.

<sup>81</sup> Raz, *The Morality of Freedom*, supra note [2], at 41-42, 57-59. It is worth noting that, in Raz’s early formulations of the service conception, binding directives were apparently supposed to exclude acting on all the background reasons (or dependent reasons, as Raz sometimes calls them), because that would be double-counting. See, e.g., *ibid.* 42: “[R]easons that could have been relied upon to justify [an arbitrator’s] decision before his decision cannot be relied upon once the decision is given.” However, in a recent article, Raz appears to have



background reasons are preempted is supposed to explain the mandatory nature of my reason to follow the directives.<sup>82</sup> Furthermore, by preempting the background reasons, the directives are supposed to replace those reasons for me. Since the background reasons are categorical in nature, it is very plausible to think that a reason that replaces them is likewise categorical. If whenever I engage in the activity of transporting the dangerous substance I have a reason to follow the agency's directives that is both mandatory and categorical, that would appear to be sufficient to establish that I have a moral obligation to follow the directives.<sup>83</sup> If I have a moral obligation to

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weakened the double-counting prohibition to some extent. Binding authoritative directives are now said to exclude acting only on those background reasons which the lawmaker was meant to consider and which conflict with the directive. Raz observes, quite sensibly, that the preemptive or exclusionary nature of a binding directive does not exclude relying on reasons for behaving in the same way as the directive requires, but only those reasons "on the losing side of the argument." Joseph Raz, "The Problem of Authority: Revisiting the Service Conception," *Minnesota Law Review*, 90 (2006), 1003 at 1022. Sensible as this is, it clearly permits double-counting, since there is nothing to prevent me from acting on both the directive and the winning background reasons. Furthermore, since it is difficult to see how I can act on the winning reasons without knowing and taking account of the fact that they outweigh the losing ones, it seems to follow that, even though I cannot act on the losing reasons alone, I can nonetheless act on the totality or balance of background reasons, and indeed I must do so whenever I act on the basis of the winning reasons. In light of these considerations, it is no longer clear exactly what, on Raz's general account of practical reasoning, a preemptive or exclusionary reason is supposed to exclude. Notice that this is relevant to the issue, mentioned in note [74] above, of whether Raz's theory demands compliance with the law or merely conformity.

<sup>82</sup> Raz, *The Morality of Freedom*, supra note [2], at 60.

<sup>83</sup> I wish to emphasize that, in reconstructing Raz's argument, I am trying to be as sympathetic as possible to its claims, and, in particular, I am granting that there are at least some circumstances where the NJT does in fact give rise to a moral obligation. For that reason, I have

comply with the directives, that would appear to be sufficient to establish that the agency has the legitimate authority to issue the directives, which is simply to say that it possesses the normative power that it claims for itself and that it purports to be exercising in issuing the directives.

Let me call the argument of the preceding paragraph the normal justificatory argument. The difficulty with the argument comes in the last step, where Raz moves from the interim conclusion that I have a moral obligation to obey the agency's directives to his final conclusion, which is that the agency has the legitimate authority to issue the directives that it claims to have.<sup>84</sup> Suppose that everything about the example remains the same, with the sole exception that the governmental agency issues advisory recommendations about how the dangerous substance ought to be transported, rather than directives that are meant to be obligatory. In other words, the agency does not purport to exercise a power to impose an obligation on me; it simply offers me advice, and then leaves it up to me to make a decision about what precautions to take if I decide to transport the substance in question. To ensure that no other aspect of the hypothetical is modified, we have to assume that the background reasons of safety, at least insofar as they apply to me, are not affected by the possibility that fewer persons overall will comply with the agency's views about how to transport the substance if those views are issued not as obligatory directives but simply as advisory recommendations. Let me therefore assume that the case is one in which my reason to follow the agency's directives depends solely on its expertise.<sup>85</sup> The assumption,

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chosen a case where the background reasons are both moral and categorical, as this seems to be the set of circumstances where the claim that the NJT produces a moral obligation is strongest. Other critics have argued that, in cases where the background reasons are not moral, or are not categorical but rather reasons that bear more or less weight – first-order reasons, in Raz's terminology – the NJT faces difficulties in producing a moral obligation as output. The issue is complicated, but it is not my concern here.

<sup>84</sup> Cf. Perry, "Law and Obligation," *supra* note [7], at 280-81.

<sup>85</sup> This means, among other things, that we are not dealing with a certain kind of case

then, is that I will do better in complying with the safety reasons that apply to me in transporting the dangerous substance if I follow the agency's views about what ought to be done, regardless of how many other people do likewise. On that assumption, the normal justificatory argument appears to go through, right up to the second-last step (the existence of the obligation). Given that the background reasons are categorical, and given that I will do better in complying with those reasons if I treat the agency's recommendations as preemptive and hence as mandatory, it is difficult to see how to avoid the conclusion that I have a moral obligation to follow the agency's views even though they are only issued as recommendations and not as directives. In other words, I have a moral obligation regardless of whether the agency purported to exercise a normative power to impose an obligation on me. But if I have the obligation regardless of whether or not the agency claimed to possess and purported to exercise a power to obligate me, it is difficult to see how the last step of the normal justificatory argument, which is the conclusion that the agency possesses such a power, can be justified.

Perhaps it might be suggested that, even though I have the obligation in both cases, that is not a reason to deny that, if the agency does happen to claim and to purport to exercise a power to impose obligations, the normal justificatory argument is sufficient to justify the conclusion that it possesses this power it claims for itself. But this suggestion would lead to some strange results. Suppose that no governmental agency exists to regulate the transportation of dangerous

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that Raz has discussed elsewhere, in which it would be futile for me to follow a given standard of conduct unless many other people also follow it. See Raz, *The Authority of Law*, supra note [5], 247-48. Raz gives the following example. If a sufficiently large number of people refrain from polluting a river, then the river will be clean. Any given person has a reason not to pollute only if a sufficiently large number of others do likewise, since otherwise the action of a single individual in refraining from polluting will be futile. Notice that this is a case where any given individual's reasons are affected by the existence or non-existence of a general social practice, but where the practice does not amount to a Lewis-style solution to a coordination problem.

substances, but that I have a friend who has exactly the same level of expertise that we have been attributing to the agency. My friend gives me advice about how to transport the substance that is identical in content to the directives or recommendations that we were supposing would have been issued by the governmental agency. So long as I have reason to know that I will do better in conforming with the background categorical reasons that apply to me by following my friend's advice than if I were to try to follow my own judgment, it is once again difficult to avoid the conclusion that the normal justificatory argument establishes that I have a moral obligation to follow my friend's advice. But now suppose that, instead of simply advising me, my friend claims to exercise a power to obligate me to do as she says. In accordance with this claimed power she does not simply advise me but commands me, or issues a directive to me, to do such-and-such if and when I transport the dangerous substance. Does the normal justificatory argument establish that she does, in fact, possess the moral power to obligate me that she claims for herself? It seems very odd that the mere possession of a certain kind of expertise, coupled with nothing more than a claim that one possesses a normative power to obligate others, should be sufficient to establish that one does, in fact, possess such a power. Raz himself draws attention to the similarity, from the point of view of the NJT, between obligatory directives and advice when he writes that, in pure expertise cases, "the law is like a knowledgeable friend."<sup>86</sup> But this similarity, far from lending support to the normal justificatory argument, actually undermines it. If, in cases of pure expertise, the normal justificatory argument is sufficient to justify the existence of a moral obligation to follow the views of another person about what to do, it does so whether the other person simply offers advice or claims to issue binding directives. And if the suggestion is made that whenever the normal justificatory argument justifies an obligation on the part of *B* to do as *A* says then it also justifies any claim that *A* might happen to make to have the power to obligate *B*, then we will be led to find normative powers in some rather odd places.

More generally, the fact that the NJT is capable on its own of giving rise to obligations

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<sup>86</sup> Joseph Raz, *Ethics in the Public Domain*, supra note [15], at 332.

that do not flow from the exercise of a moral power, and indeed does not even presuppose the existence of a moral power, makes clear that the normal justificatory argument faces a massive reverse entailment problem. Raz in effect concludes that a successful application of the NJT in establishing an obligation entails the existence of a moral power, and hence the existence of legitimate authority. But, as the considerations in the preceding discussion make clear, this entailment is false, and that is the essence of a reverse entailment problem.

To come at the difficulty from a slightly different direction, consider again what it means to say that one person possesses a normative power over another. I said in section III that the most plausible view, which I called the value-based conception, takes something like the following form: One person *A* has a power to effect a certain kind of change in the normative situation of another person *B* if there is reason for regarding actions which *A* takes with the intention of effecting a change of the relevant kind as in fact effecting such a change, where the justification for so regarding *A*'s actions is the sufficiency of the value or desirability of enabling *A* to make this kind of normative change by means of this kind of act.<sup>87</sup> One way to formulate the difficulty that I am arguing the normal justificatory argument faces is to point out that, in trying to justify the conclusion that one person possesses authority over another, the argument makes no essential reference to the value or desirability of the first person being able intentionally to change the normative situation of the other. It fails, in other words, to meet the value-of-intentionality condition. The NJT looks out at the world, so to speak, from the perspective of an individual who is seeking assistance wherever he can find it in helping him to conform to right reason. From this point of view, leaving aside for the moment problems of coordinating activity, there is no particular reason to distinguish advice from directives claiming to be authoritative. For that matter, it does not particularly matter whether the "advice" comes from a person or from a black box which, for all I know, might not even be subject to the control of another person. So long as I know or can readily come to know, on whatever basis, that if I follow the "recommendations" that

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Raz, *The Authority of Law*, supra note [5], at 18.

appear on the screen of the black box then I will do better in complying with the background reasons that apply to me, the normal justificatory argument seems to go through right up to the point of establishing an obligation to do as the black box recommends.

Notice that it is not sufficient to distinguish advisory recommendations from obligatory directives to say that, in the former case, the recommendations give me reasons for belief but not reasons for action, or that the advisor is a mere theoretical authority for me but not a practical authority. In the case of the governmental agency, for example, the normal justificatory argument appears to go through whether the agency issues advisory recommendations or obligatory directives. Furthermore, in the case of both recommendations and directives, the argument only goes through if I have a basis for knowing, as a general matter, that I will do better by complying with the agency's views than if I try to act on my own judgment.<sup>88</sup> It may or may not be true that, on any particular occasion when I transport the dangerous substance, that I have a reason to believe that I will do better on that occasion by following the agency's views, and this so whether those views take the form of advisory recommendations or authoritative directives. What matters

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<sup>88</sup> Raz explicitly acknowledges the epistemic basis of his account of legitimate authority when he writes that "[i]f one cannot have trustworthy beliefs that a certain body meets the conditions of legitimacy [i.e. the NJT and an "independence condition" which holds that it more important, in the relevant type of case, to conform to reason than to decide for oneself], then one's belief in its authority is haphazard and cannot . . . be trusted. Therefore, to fulfill its function, the legitimacy of an authority must be knowable to its subjects." Raz, "The Problem of Authority: Revisiting the Service Conception," *supra* note [81], at 1025. It is worth noting in this regard that Raz further acknowledges that, in the case of both authority and advice, it is ultimately up to each individual to decide for himself whether or not the conditions of legitimacy are met: "[I]n following authority, just as in following advice, . . . one's ultimate self-reliance is preserved, for it is one's own judgment which directs one to recognize the authority of another, just as it directs one too keep one's promises [and] follow advice . . . Ibid. 1018.

in both cases is, to repeat, that I must have good reason to believe that I will in general better comply with the reasons of safety that apply to me if I follow the views of the agency.

Understood as a full-fledged response to the justification problem, the NJT appears to fail not just the value-of-intentionality condition that was identified in section III, but also the prospectivity condition. This is because the fact that I will do better in complying with reasons that apply to me by obeying a given directive might only arise at a point in time later than the time at which the state issued its directive. Even if the NJT is correct that I come under an obligation to obey the directive at that later point in time, this is insufficient to show that the state had the legitimate (as opposed to the claimed) power to issue a directive that was binding at the very moment that it was issued. As we saw in section III, the prospectivity condition holds that the default position as to when an exercise of a power has binding effect is the moment the power is exercised.

In light of the above considerations, it is noteworthy that, in his most recent work on authority, it is no longer clear that Raz means to offer the service conception as a full-fledged response to what I have been calling the justification problem, i.e., the problem of how to substantively justify legitimate political authority in particular cases. In a recent article, Raz states that the service conception is driven by a theoretical problem and by a moral problem.<sup>89</sup> The theoretical problem concerns the issue of “how to understand the [normative] standing of an authoritative directive.” The moral problem is, “how can it ever be that one has a duty to subject one’s will and judgment to those of another?” The moral problem is clearly just a version of the subjection problem that has been phrased in mandatory rather than in permissive terms. The theoretical problem, however, is not the same as the justification problem. In response to the theoretical problem, Raz observes that “[a] person can have authority over another only if there are sufficient reasons for the latter to be subject to duties at the say-so of the former.” He adds

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<sup>89</sup>

Ibid. 1012-13.

that this observation does not tell us when anyone has authority over another or even that anyone ever can have such authority. It only states what has to be the case for one person to have authority over another, and “[t]hat is all that one can ask of a general account of authority.” The theoretical problem thus apparently raises no more than a bare conceptual issue, which is answered, in essence, by pointing out that one person can have authority over another only if there are sufficient reasons to justify the possession by the former of a normative power to impose obligations on the latter. (Raz does not use the term “power” here, but that nonetheless appears to be what is at issue.) Not only is the service conception not explicitly advanced as a general response to the justification problem, but the justification problem is not even formulated as a distinct problem in its own right. The task of determining who has authority over whom and with regard to what “is a matter of evaluating individual cases.”

Raz’s response to the theoretical problem – “[a] person can have authority over another only if there are sufficient reasons for the latter to be subject to duties at the say-so of the former” – sounds rather like a less-refined version of the value-based conception of a moral power that I introduced in section III. Notice that Raz’s formulation makes no mention of the NJT. It will be recalled that the third of the three initial observations that I offered about the NJT at the beginning of the present section was that, at least in his early writings on the subject, Raz clearly regarded the NJT as a foundational element of the very concept of practical (and therefore of political) authority. I said that the value-based conception of legitimate authority provided a competing conception of authority in this regard, and referred to the need to resolve this disagreement as the “conceptual problem.” At this stage, I would like to make two points: First, what Raz now calls the theoretical problem and what I am calling the conceptual problem appear to be one and the same. Both offer an analysis of the concept of legitimate authority, and neither is intended to serve as a substantive response to the justification problem. Rather, each provides a conceptual framework within which substantive justifications can be offered in specific cases. Second, Raz’s response to “the theoretical problem,” insofar as it makes no mention of the NJT and bears a certain resemblance to the value-based conception of a moral power, might indicate that Raz is



possibly moving away from his earlier conceptual analysis of legitimate authority, which made the NJT central, and moving tentatively in the direction of the value-based conception. Such a move, I wish to suggest, would be warranted. I will return to a discussion of the conceptual problem in section VI.

Raz goes on, in the same article, to offer the service conception of authority as a specific response to the moral problem, which, as I have already noted, appears to be a mandatory version of the subjection problem. It is worth quoting Raz's restatement of the service conception in full:

The suggestion of the service conception is that the moral question is answered when two conditions are met, and regarding matters with respect to which they are met: First, that the subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority's directives than if he does not (I will refer to it as the normal justification thesis or condition). Second, that the matters regarding which the first condition is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority (I will refer to it as the independence condition).<sup>90</sup>

Raz anticipates the objection that the two conditions do not solve the moral problem because the second condition merely restates it. He responds that the independence condition "merely frames the question," and that part of the answer to the moral problem is to be found in the first condition, namely the NJT.<sup>91</sup> Raz argues that "the key to the justification of authority" is that, far from hindering our rational capacity, i.e., our capacity to guide our conduct in accordance with reason, authority actually facilitates this capacity. We value our rational capacity not just because we value the freedom to use it, but also because "its purpose, . . . by its very nature, [is] to secure

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<sup>90</sup> Ibid. 1014.

<sup>91</sup> Ibid. 1017-18.

conformity with right reason.” When the conditions of the NJT are met, we are better able to achieve this purpose by acting in accordance with the relevant authority’s directives than if we try to exercise our rational capacity directly. In such cases, Raz argues, the importance of conforming our actions to right reason outweighs the importance of self-reliance and acting on our own independent judgment. He goes on to point out that, because we are hardwired to respond instinctively to certain dangers, sometimes we do better in achieving the purpose of our rational capacity by acting on our emotions. More generally, authority is just one technique among others that is capable of helping us to achieve this purpose: The primary value of our general ability to act by our own rational judgment can also be met, according to Raz, by “making vows, taking advice, binding oneself to others long before the time for action with a promise to act in certain ways, or relying on technical devices to ‘take decisions for us,’ as when setting alarm clocks, speed limiters, etc.” To understand authority properly we must therefore see it “not [as] a denial of people’s capacity for rational action, but rather [as] simply one device, one method, through the use of which people can achieve the goal (*telos*) of their capacity for rational action, albeit not through its direct use.”

This discussion of our rational capacity is illuminating and insightful. It shows that the two conditions of the service conception, namely the NJT and the independence condition, together offer a response to a very broad understanding of the subjection problem. In doing so it makes clear why we are justified, in appropriate circumstances, in subjecting our will not just to certain demands or requests by other persons that we behave in a certain way, but also to advice that others give us and even to mechanical devices such as speed limiters. (Recall the earlier discussion of a black box which dispenses “advice” but which may not be under the control of, or even have ever been programmed by, a human being.) However, in drawing attention to the fact that authority is just one device or technique among others that can enable us better to comply with right reason, this response to the subjection problem simply underscores my earlier point that the NJT makes no essential reference to the claim of *de facto* authorities to be exercising a moral power to impose obligations when they issue their directives. As I noted earlier, the NJT looks

out at the world from the perspective of an individual who is seeking assistance wherever he can find it in helping him to conform to right reason. So long as I have reason to know that I will in general do better in complying with the reasons that apply to me in a given type of case by following the views of another person rather than by acting on my own judgment, it does not matter whether those views are offered in the form of advice or in the form of directives. No doubt it is a necessary condition of one person's possessing legitimate authority over another person that the subjection problem must have been solved, and the service conception is one means – perhaps among others – to solve it.<sup>92</sup> But this does not mean that the service conception can be understood as a full-fledged response to the problem of justifying legitimate authority. The perspective of the service conception is that of an individual looking for practical guidance, not that of either a putative power-holder or a putative subject of a power. For these reasons, the service conception is not in the end best viewed as a conception of practical or political authority at all, but rather as a general response to a very broad understanding of the subjection problem. As such, it provides a robust and convincing answer to Wolff's anarchist challenge, which, as we saw in the preceding section, is primarily grounded not in the justification problem but in the subjection problem, and a very broad understanding of the subjection problem at that.

For purposes of the discussion in this section, I have been assuming that the service conception is, in fact, capable of generating obligations when the condition of the NJT is

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<sup>92</sup> One is tempted to say that whenever one person has an obligation to do as another person directs then the subjection problem, one way or another, must have been resolved. Otherwise, how could it be the case that one has an obligation? Since it is hardly obvious that, whenever one has an obligation to do as another person directs that one will do better in conforming to the reasons that apply to one by fulfilling one's obligation, this suggests that there must be other ways to solve the subjection problem than by satisfying the NJT. I find this suggestion plausible, but will not pursue it further here.

satisfied.<sup>93</sup> So long as I know, or can readily come to know, on whatever basis, that if I do as another person advises or directs then I will do better in conforming with the background reasons that apply to me, the normal justificatory argument appears to succeed in establishing an obligation. Thus the argument at least sometimes will support the conclusion that I have a duty not just to obey the law – i.e., to conform my conduct to what the law requires – but to comply with it. As was noted in section II, this appears to be more than the law itself demands; ordinarily, we think that conformity with the law is sufficient to count as obedience. Even so, we can still ask whether the obligation that the NJT generates satisfies the five conditions set out in section II for the existence of a general obligation to obey the law. Raz himself thinks that the NJT is capable in principle of establishing a general obligation to obey the law, but that as a practical matter it never does. To put the difficulty in terms of the five conditions, condition (v) – the universality condition – will not in practice ever be met. Sometimes particular directives will bind only some persons and not others, and sometimes they will bind no one at all. But what about the other four conditions?

As I will argue in the following section, the NJT appears to require that, if I will do better in conforming to the reasons that apply to me by following the law of California rather than the law of Pennsylvania, and if I know or can readily come to know this, then I have an obligation to follow the law of California and not the law of Pennsylvania, and this is true whether Pennsylvania sees the matter this way or not. If it is correct that the NJT has this implication, then the obligations that it generates appear not to meet Green's condition (iv). Condition (iv), it will be recalled, holds that an obligation to obey the law must be a particular reason for action,

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<sup>93</sup> See *supra* note [83]. A natural question to ask is, to whom are such obligations owed? The discussion of the NJT in the text suggests that they are owed only to oneself, or, perhaps, to no one. But this is in conflict with a natural intuition that legitimate obligations to obey the law are owed to one's fellow citizens, or to one's community as a whole. See further *supra* note [49].

meaning a reason only for a citizen's own state and not for the laws of other states. If it is true that, according to the NJT, I am obligated by the law of California and not by the law of Pennsylvania, and that this is true even though Pennsylvania regards me as subject to its jurisdiction and California does not, then even though the NJT is correct that I have an obligation, the particularity condition has not been met.<sup>94</sup>

## VI. Collective Political Goals

In the preceding section I argued, with respect to one of the two main types of case to which Raz says the NJT has application, namely, expertise cases, that the NJT fails as a substantive theory of political authority, i.e., a theory which is intended to address the justification problem. In this section I begin by arguing that the NJT also fails as a substantive theory with respect to the other main type of case that Raz discusses, namely, coordination problems. Towards the end of the section, I discuss the conceptual problem of political authority that was briefly mentioned in the preceding section.

In his recent restatement of the service conception, Raz writes that “[t]he function of authorities is to improve our conformity with . . . background reasons by making us try to follow their instructions rather than the background reasons.”<sup>95</sup> It is not entirely clear what Raz means

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<sup>94</sup> I believe this is, in essence, the problem identified by Jeremy Waldron in Waldron, “Authority for Officials,” in L.H. Meyer, S.L. Paulson, and T.W. Pogge, eds., *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford: Oxford University Press, 2003) 45, at 64. For the most part Waldron discusses the problem as one that holds for authority relations among officials, but, as he recognizes, the problem is in fact a pervasive one for the NJT.

<sup>95</sup> Raz, “The Problem of Authority: The Service Conception Revisited,” *supra* note

by “function” here, but the two most likely possibilities are that he intends this statement to address either the justification problem or the conceptual problem. For the time being, I will take it as addressing the justification problem.

If we are to conceive of the function of political authority in terms of the justification problem, consider the following substantive account as an alternative to the NJT. The function of governments is not to improve our conformity with right reason for its own sake, but rather to accomplish important moral goals or tasks that governments are uniquely situated, or at least particularly well situated, to achieve on behalf of their subjects by means of the normative instrument of a power to impose obligations. Let me call this account, following Leslie Green, the “task-efficacy theory.”<sup>96</sup> The relevant moral goals will generally be, in some loose sense that

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[81], at 1019.

<sup>96</sup> In what follows, my aim is simply to sketch, for purposes of illustration, a type of substantive theory of authority which is to be offered as a response to the justification problem, i.e., the problem of justifying legitimate political authority. Accounts of the kind I have in mind are relatively common in the literature, particularly in the natural law tradition. Taking the views of Elizabeth Anscombe and John Finnis as examples, Leslie Green calls such theories “task-efficacy” justifications of legitimate authority. Leslie Green, “The Duty to Govern,” *Legal Theory* 13 (2007), 165. The basic idea, as Green describes it, is that “[necessary tasks in life] fall to those who can as a matter of fact effectively settle problems of coordination and the common good.” Ibid. at 173. Even though Green is talking not about a single theory but rather a family of theories, it will, for present purposes, be convenient to refer in the text to the task-efficacy theory. See further Elizabeth Anscombe, “On the Source of the Authority of the State,” *Ratio* 20 (1978) 1, at 6; Finnis, *Natural Law and Natural Rights*, supra note [62], at 246. I believe that David Copp’s substantive account of legitimate authority should also be regarded as falling into this family of views. See Copp, supra note [49]. Green interestingly characterizes Finnis as holding that “some [persons] have a nonvoluntary duty to govern, grounded in their effectiveness at a morally

I do not for the moment attempt to define, collective in nature. Consider, by way of example, the idea that some instances of governmental power are justified by reference to the ability of governments to achieve large-scale coordination among the activities of many persons. Raz has always regarded appeal to the ability of governments to achieve such coordination, understood in a broad sense and not just as a solution to a narrowly-conceived, Lewis-style coordination problem, as one of the two main ways that the service conception can justify political authority.<sup>97</sup> Although any response to the justification problem which is based in whole or in part on securing coordination must contend with a number of difficult questions,<sup>98</sup> it nonetheless seems clear that, one way or another, the ability of governments to coordinate complex activity will inevitably play a prominent role in the justification of most political authorities, to the extent that they can be justified at all. It also seems clear that any justification of political authority which rests on the ability of governments to coordinate activity must at some point appeal to an interest which people generally have in the successful achievement of coordination. There is no harm in saying that, because people have such an interest, they have a background reason “to wish for a convention,”<sup>99</sup> as Raz has put it, or something along those lines.

We nonetheless overlook an important dimension of what is valuable about coordination if we limit ourselves to saying that the power to issue coordination-securing directives is justified because the possession and exercise of this power will enable people to better conform their own actions with the requirements of right reason. Often a “a reason to wish for” coordination is

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necessary task,” and that it is this duty – this responsibility – that ultimately grounds these persons’ legitimate authority over others. Green, “The Duty to Govern,” *supra*, at 167. Although it is not a point that can be discussed here, Green has highlighted a very significant feature of Finnis’ theory of authority.

<sup>97</sup> See, e.g., Raz, *The Morality of Freedom*, *supra* note [2], at 49-50.

<sup>98</sup> Cf. Leslie Green, *The Authority of the State*, *supra* note [16], at 89-121.

<sup>99</sup> Raz, *The Morality of Freedom*, *supra* note [2], at 50.

indeed best understood as a background reason for action, meaning a reason to act in such a way that one's particular activities are coordinated with those of others. But it is important to recognize that persons also have a background interest in the existence of general social coordination, meaning coordination in many different aspects of public life, which goes far beyond ensuring that their actions are coordinated with the actions of others. I will benefit, for example, in countless different ways because other people's activities have successfully been coordinated so as to ensure that the transportation of goods on the highways is fast and safe, and that the air traffic control system operates efficiently and with a high degree of security. For example, such coordination of the activities of others ensures that there is food for me to buy at local stores, and that planes do not regularly fall out of the sky and injure me. The achievement of coordination is a valuable moral goal in its own right, quite apart from the extent to which particular individuals might in their own actions better conform with reasons that apply to them. The fact that many people will benefit from a set of directives which successfully coordinates the air traffic control system will surely figure in any plausible argument for the conclusion that the government is justified in issuing these directives, and this is so even though the directives do not directly engage the background reasons for action of many (and perhaps most) of the people who benefit in this way. Persons who benefit in this "passive" way may well have a "reason to wish for" a convention or, more generally, for coordination or cooperation among others, but in this context a "reason to wish for" is best understood as an interest of a certain kind, and not as a reason for action. As we shall see below, the task-efficacy view, understood as operating within the conceptual framework of the value-based conception of legitimate authority, has no difficulty handling this type of case.

As Raz has observed, his general view of authority entails the substantive moral thesis that all political reasons are subordinated to ordinary individual morality.<sup>100</sup> Let me refer to this as the "political subordination thesis." Even if this thesis is true, which is not a self-evident matter, it is

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Ibid. 72.



important to make clear that the relevant background reasons of individual morality are often very general and only indirectly related to the actions the government is empowered to take. As Raz says, the fact that everyone has reason to improve their own economic situation does not mean that everyone has a reason to raise taxes: “[T]hose helping us may have good grounds for pursuing the goals set by reasons that apply to us in ways that are not open to us,” and indeed “they may be assigned the task of helping us precisely because of that.”<sup>101</sup> While this is certainly correct, it nonetheless seems strained to say that the government’s role in such a case is to help every individual to act in ways which better conform with the reason they have to improve their own economic situation, as opposed to saying that the government’s role is, quite simply, to achieve the moral goal of improving everyone’s economic situation. This latter formulation is what the task-efficacy view would have to say on the matter.

To see the general point more clearly, consider the following example. Suppose that a society has good reasons of security to have a standing army of a certain size, but that it would be wasteful of resources to have an army of any larger size. Assume that the government is justified in achieving this goal by conscripting the required number of soldiers from the pool of citizens who are generally fit to serve in the army, and that it is also justified in determining who is to be drafted by instituting a fair lottery. It is no doubt true, in such a case, that each citizen has a background moral duty to contribute in appropriate ways to maintaining the security of the society, so that it is true of each citizen who is drafted that she is complying with a background reason that applies to her. But does it follow that she is better complying with that reason by obeying the directive to serve in the army? After all, she only has the duty to serve because her name happened to come up in the lottery. Similarly, is it sensible to say that the function the government is fulfilling in instituting the draft-by-lottery is to enable each citizen who has been drafted to conform better with a background reason that applies to her? If that were the

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<sup>101</sup> Raz, “The Problem of Authority: Revisiting the Service Conception,” *supra* note [81], at 1030.

government's function, why is it only helping Susan by drafting her, and not helping John by drafting him as well? Are we to say instead that the government is somehow serving the goal of helping each citizen who might have been drafted to better conform with a background reason? Surely we make the best sense of such a case by saying, quite simply, that the government's function is to take steps to achieve the general moral goal of providing for the society's security by means of the exercise of a power to impose duties on (some) citizens. Again, this is what the task-efficacy view would say.

Assuming the political subordination thesis is true, a background reason for action, such as the postulated duty to contribute in appropriate ways to collective security, must figure in any argument that might plausibly be offered to show that the government does, in fact, possess the power to conscript in this way. This is true for both the task-efficacy approach and the the NJT. But we nonetheless mis-describe the situation if we say that the possession of the power is justified because its exercise ensures that those whose normative situation is affected will better comply with that background reason than would otherwise be the case. That is why I said earlier that it may well be a necessary condition of a government's possessing legitimate authority over any particular person in regard to any particular matter that the NJT, or some condition similar to the NJT, be satisfied. What is arguably necessary is that, in light of the political subordination thesis, the justification of the power invokes some background reason that applies to any person whose normative situation is affected by its exercise. But it does not follow that the exercise of the power enables any such person to better comply with that reason. Still less does it follow that this was the purpose either of having the power or of exercising it in particular instances.

Raz recognizes that there will be cases, along the lines of the conscription example, in which burdens are imposed on a small number of persons in order to ensure that a benefit accrues to the larger community, or to some segment of it. He notes that "[t]he government has authority over [those who bear the burdens] only if they have reason to contribute to a scheme which

benefits others.”<sup>102</sup> This is true if the political subordination thesis is true; in the example, the reason in question is the duty to contribute in appropriate ways to maintaining the security of the society. Expanding on this point, Raz observes:

It is not good enough to say that an authoritative measure is justified because it serves the public interest. If it is binding on individuals it has to be justified by considerations which bind them. Public authority is ultimately based on the moral duty which individuals owe their fellow humans.<sup>103</sup>

All of this is surely true, but that fact does nothing to buttress the claim that the NJT must be satisfied in order to justify political authority. Perhaps Raz might wish to say of the conscription example that, once the scheme has been put in place and it has been determined who has the legal duty to serve and who does not, each individual is, in fact, complying in the best possible fashion, all things considered, with his or her background duty to contribute in appropriate ways to the security of the society. To interpret the situation this way sounds artificial and strained. But even beyond that, there is simply no reason to think that anything like this is in general true, as we can see by varying the hypothetical.

Suppose that the government in question permits voluntary enlistment, and only uses the conscription lottery to bring the army up to its optimal size where enlistment numbers fall short. It might well be the case that, for any given citizen, she best complies with the background duty to contribute in appropriate ways to the security of the society if she enlists, rather than simply submitting to the draft as and when required. Perhaps this is so, for example, because the act of enlistment is a public expression of one’s willingness to serve one’s country, and that one better complies with one’s background duty by making a public declaration of this kind. To avoid

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<sup>102</sup> Raz, *The Morality of Freedom*, supra note [2], at 71.

<sup>103</sup> Ibid. 72.

unnecessary complications, assume that a person who has just been conscripted had already made the decision to enlist, but had not actually acted on the decision at the time that she was conscripted. Thus it is not true, at least of this particular person, that she is better complying with her background duty by obeying the order to report for military service than she would if she were to act on her own judgment by enlisting, and this is true even though the background duty is part of the justification for the specific duty to report for service when so ordered. Raz is correct to say that “[i]t is not good enough to say that an authoritative measure is justified because it serves the public interest,” but only in the sense that appeal to the public interest is not sufficient by itself to justify the authoritative measure. The point of the authoritative measure is surely to serve the public interest, which here takes the form of a collective goal of ensuring general security. This is certainly how the task-efficacy view would regard the matter. Raz is also correct to say that “[p]ublic authority is ultimately based on the moral duty which individuals owe their fellow humans.” Given the political subordination thesis, this presumably means that a moral duty, such as the postulated background duty to do one’s part to maintain collective security, will necessarily figure in the justification of an authoritative measure such as the conscription lottery. But it does not mean that the point or function of the authoritative measure is to enable persons better to comply with that background duty.

This is perhaps a good place to point out another, related difficulty to which the service conception gives rise, insofar as it holds that the function of authority is, quite simply, to improve conformity with right reason. Raz has observed that the NJT “invites a piecemeal approach to the question of the authority of governments, which yields the conclusion that the extent of governmental authority varies from individual to individual, and is more limited than the authority most governments claim for themselves in the case of most people.”<sup>104</sup> Thus if, to revert to an earlier example, I happen to know much more about how safely to transport a dangerous substance than does the governmental agency which has been charged with regulating

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*Ibid.*, 80.

such matters, the piecemeal approach suggests that the agency does not have the authority over me that it claims, and that I am not morally bound by its directives. If we say that the function of authority is, quite simply, to enable me better to conform with background reasons that apply to me, then it becomes difficult to make sense of the fact that legal systems claim virtually unlimited power to regulate any activity or aspect of life,<sup>105</sup> and that they do not acknowledge any exceptions to that authority which are not explicitly recognized by the law itself. No doubt Raz is correct to say that it is not a condition of adequacy of an explanation of the concept of authority that those who have authority accept, even implicitly, that the explanation is correct.<sup>106</sup> Even so, one would nonetheless expect any adequate explanation to make sense of, in the minimal sense of being consistent with, the behavior of those who claim authority. If the function of authority really were to enable persons better to conform with right reason, then one would expect there to be many cases in which the claim of authority could be justified by appeal to pure expertise.<sup>107</sup> One would nonetheless also expect in such cases that the law would act, as Raz has put it, “like a knowledgeable friend,”<sup>108</sup> acquiescing gracefully when a subject either knows more than it does

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<sup>105</sup> See supra note [5].

<sup>106</sup> Raz, “The Problem of Authority: Revisiting the Service Conception,” supra note [81], at 1006.

<sup>107</sup> The very formulation of the NJT, which looks to whether one person is able to help another better to conform to right reason, should lead us to expect many pure expertise cases in the law. In fact, there are almost none. (I leave aside the issue of paternalism, which requires more in the way of substantive justification than the NJT can provide.) In his recent article restating his views on authority, Raz remarks that expertise and coordination are, in the case of political authority, usually “inextricably mixed.” Raz, “The Problem of Authority: Revisiting the Service Conception,” supra note [80], at 1031, 1036. This may be so, but not because pure expertise cases are, for practical reasons, say, not possible or feasible. The lack of pure expertise cases in the law is, in the end, an embarrassment for the NJT.

<sup>108</sup> Raz, *Ethics in the Public Domain*, supra note [15], at 332.

or succeeds in finding some third party who knows more.<sup>109</sup> Regarded as a general response to the subjection problem, the NJT counsels me to seek assistance in conforming to right reason wherever I can find it, so that if I have good grounds for believing that I will generally do better in safely transporting a dangerous substance by following the law of California than by following the law of Pennsylvania, then I should follow the law of California. But the law of Pennsylvania does not see the matter this way. It insists that, insofar as I fall within its jurisdiction, I have a categorical obligation to follow its directives except to the extent that the law itself makes room for some exception. Far from encouraging me to seek assistance in conforming to right reason wherever I might find it, the law tells me that I am obligated to follow its directives, and that is the end of the matter. This suggests that there is an almost unavoidable tension in regarding the NJT as a full-fledged general response to both the subjection problem and the justification problem.

Insofar as he has, at least in the past, treated the service conception as a full-fledged response to the justification problem, Raz has viewed the analysis of authority as beginning with the one-to-one relation between an authority and a single person subject to the authority, so that authority over a group of persons is to be accounted for by reference to authority relations between individuals.<sup>110</sup> Let me call this the aggregative aspect of the service conception. More

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<sup>109</sup> Cf. Perry, “Law and Obligation,” *supra* note [7], at 283-84.

<sup>110</sup> Raz, *The Morality of Freedom*, *supra* note [2], at 71. It is worth pointing out that the aggregative aspect of Raz’s theory of authority arises for other theories besides his own. It arises, for example, for all so-called “voluntaristic” theories, which make the state’s authority over any given individual a function of whether or not that individual has performed a certain kind of specified voluntary act. Thus it applies to the common understanding of the argument from fair play, as well as to many versions of consent theory. That this is so is illustrated by Simmons’ characterization of his own, generalized version of a Lockean theory of authority. Simmons holds that an obligation to obey the law is triggered by voluntary acts of the kind just

precisely, the aggregative approach means that the extent of legitimate authority in a given state is a function of (1) the total number of individuals over whom, considered one by one, the state can be said to have legitimate authority and (2) the extent of legitimate authority held over each individual. The aggregative aspect goes hand-in-hand with the piecemeal approach to political authority, which suggests, in turn, that the paradigm of an authority relation is, for the service conception, precisely a case of pure expertise. But, as we saw in the preceding section, the NJT simply cannot justify political authority based on pure expertise. If, however, we adopt the view that the principal function of political authority is not to enable individuals taken one by one to better conform with right reason but that it has the function, rather, of accomplishing, in line with the task-efficacy view, important moral goals by means of a power to impose obligations, then we are likely to see the paradigmatic instances of authority as those in which the government's actions can be understood, to borrow a term from Finnis, as intended to advance the common good. As Finnis recognizes, large-scale coordination of complex activity is perhaps the best

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discussed. Simmons, *Justification and Legitimacy*, supra note [11], at 154-55. Since Simmons subscribes to the view that “political voluntarism [offers] the correct account of these transactional grounds for legitimacy,” *ibid.* at 155, it follows that the legitimacy of a given state is, on his account, a function of how many individuals happen to have transacted in the right kind of way with the state. Thus although Simmons' theory of authority is quite different from Raz's – Raz at no point relies on consent or any other voluntaristic notion – both theories nonetheless hold that any legitimacy that a given state possesses *qua* state depends on an aggregation of whatever distinct authority relations happen to hold between the state and each of its subjects considered one by one. Since Simmons does not think that any state, no matter how just, has received the consent of all of its subjects, he agrees with Raz that no state is every fully legitimate or, as he puts it, legitimate simpliciter. But because the state *is* legitimate for those who have consented to it, he similarly agrees with Raz that the legitimacy of the state *qua* state can be a matter of degree.

example of how the common good can be advanced.<sup>111</sup> Once we reject the idea that the function of political authority is to enable individuals better to conform with right reason one by one, then we are also naturally led to the view that an exercise of political authority can probably only rarely be justified by appealing solely to expertise, or at least to expertise of the kind Raz is interested in, namely, an ability to help other individuals better conform to the reasons that apply to them. At any rate we cannot say that the possession of expertise of this kind is, as the service conception would have it, a *prima facie* basis in and of itself for justifying legitimate authority. It is not even a basis for a limited authority to act paternalistically, since paternalism requires more in the way of substantive moral argument than the NJT can provide.

At this point, let me return to the conceptual problem that was discussed in the preceding section. As we saw there, Raz, at least in his early work, treated the NJT as the conceptual core of legitimate authority. But the requirements of the NJT – *A* has authority over *B* if *B* will do better in complying with the reasons that apply to her if she is guided by *A*'s directives instead of following her own judgment – are so specific that one is naturally inclined to treat it as a substantive theory of justification rather than as the general and abstract analysis of a concept. Another way to put this point is to say that the NJT seems to be a complete theory of authority in itself, which requires nothing more in the way of substantive moral argument to reach conclusions about whether a particular *de facto* authority is legitimate or not; it simply requires empirical data about who can assist whom in conforming with right reason.<sup>112</sup> The theory's conceptual

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<sup>111</sup> Finnis, *Natural Law and Natural Rights*, *supra* note [62], at 153.

<sup>112</sup> This is not quite right, since sometimes the value of autonomy will win out over what would otherwise constitute legitimate authority. But this concerns a limit on the scope of authority; it is not part of the theory of authority itself. Autonomy plays a more integral role in Raz's response to the subjection problem, which is only natural since Wolff's anarchist challenge to the rightness of subjecting one's will to another (in any situation, and not just the political context) is based on a very strong conception of autonomy.



framework and its substantive justificatory claims seem indistinguishable. Furthermore, the NJT's failures as a substantive justificatory theory, documented in this and the preceding section, surely disqualify it as an analysis of the concept. If the view contains within itself a method for determining when someone is a legitimate authority for someone else, and that method does not work in a wide range of cases, then the view cannot be an acceptable analysis of the concept of authority.

However, the largest failure of the NJT, considered as an exercise in conceptual analysis, concerns its aggregative aspect. If the NJT has a conceptual core, this is it. As we have seen, Raz writes that “[t]he analysis of authority [concentrates] exclusively on a one-to-one relationship between authority and a single person subject to it,” and that “[i]t is an advantage of the analysis . . . that it is capable of accounting for authority over a group on the basis of authority relations between individuals.”<sup>113</sup> This may make some sense for very limited instances of practical authority, such as that involved in the parent-child relationship. But it cannot be true that the legitimacy of large-scale, highly complex instances of government-instigated schemes of coordination and cooperation – for example, the totality of the tightly inter-related regulatory regimes governing the airline industry, ranging from the safe design of aircraft, to safety in aircraft manufacture, to the oversight of passenger security, to the provision of rules ensuring the safe and efficient operation of airports and flights – is determined by examining the relationship of the government (or its agencies) to each and every individual involved in these activities on a one-to-one basis and somehow combining the results into a comprehensive judgment about the legitimacy of the enterprise as a whole. In fact, this overstates what the NJT is capable of even in principle. The service conception provides no algorithm or formula for “accounting for the authority over a group on the basis of authority relations between individuals”; in its terms, the NJT applies only to the normative relationships between an authority and the individuals subject to it, considered one by one. There is no room for the idea of the enterprise as a whole possessing

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<sup>113</sup> Raz, *The Morality of Freedom*, supra note [2], at 71.

legitimate authority in any sense other than the conjunction of statements about all such relationships.

At this point, it is natural to suggest that the NJT is not the fundamental core of the concept of authority, but rather a supplementary constraint that is to be added to, say, the value-based conception of authority that was introduced in section III. The NJT's task would then be to act as a filter on background reasons that can figure in a substantive justification of legitimate authority. The claim would be that the actual substantive theory, whatever it is, must only operate with background reasons that an individual will end up better complying with. There are a number of difficulties with this suggestion. The first is that, as shown by the hypothetical of the person who was conscripted after she had decided to enlist but before she had the chance to do so, there is simply no reason to think that a person must better comply with relevant background reasons, as opposed to simply complying with them. Second, we already have an appropriate filter on reasons, which ensures precisely that people will comply with appropriate background reasons, but which does not insist they must better comply with them. I am referring to the political subordination thesis, which holds, it will be recalled, that all political reasons are subordinated to political morality. This is a substantive moral thesis which, for purposes of discussion, I am assuming to be true. It requires that there be, in the case of the conscription hypothetical, for example, a background reason such as the duty to contribute in appropriate ways to the collective security of one's country. As it happens, the service conception contains a feature, in addition to the NJT, which is quite relevant here. The "dependance thesis," which is very close in substance to the political subordination thesis, states that "[a]ll authoritative directives should be based, among other factors, on reasons which apply to the subjects of the directives and which bear on the circumstances covered by the directives."<sup>114</sup> It is the dependence thesis, not the NJT, which is the element of the service conception that is best suited to serve the role of a constraint on background reasons. The dependence thesis is fully compatible with the

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<sup>114</sup> Raz, *Ethics in the Public Domain*, supra note [15], at 198.

task-efficacy theory, in a way that the NJT is not.

Let me turn now to the value-based conception of a moral power that I introduced in section III. According to that conception, one person *A* has a power to effect a certain kind of change in the normative situation of another person *B* if there is reason for regarding actions which *A* takes with the intention of effecting a change of the relevant kind as in fact effecting such a change, where the justification for so regarding *A*'s actions is the sufficiency of the value or desirability of enabling *A* to make this kind of normative change by means of this kind of act. One of the central claims of this article is that this conception of a moral power should be regarded as the conceptual core of legitimate political authority (and most other forms of practical authority). There are a number of points about the value-based conception that should be noted. First, as I have emphasized before, the claim I am making is a piece of normative/conceptual analysis;<sup>115</sup> it is not intended to be a substantive theory addressed to the justification problem, nor can it operate as such. It is not self-applying; further moral argument is required to determine what kinds of value (if any) will justify *A*'s possession of such a power, as well as to determine the sufficiency of that value. This information will be provided by particular substantive theories of justification. Furthermore, given the open-endedness of the value-based conception, it can, depending on one's substantive views, be supplemented by further moral theses, such as the political subordination thesis. Second, as we saw in section III, the value-based conception provides specific criteria to judge the adequacy of substantive theories. These are the value-of-intentionality and the prospectivity conditions. Together these criteria rule out, in quite decisive ways, most of the extant theories in the field, including the argument from the natural duty of justice, the fair play principle, the associative obligations theory, and the NJT. Third, by virtue of the fact that it begins with the idea of a normative power that the state claims to hold over all its subjects, who may well number in the millions, the value-based conception is by its very nature a

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<sup>115</sup> Cf. Raz on "normative-explanatory" accounts of concepts. *The Morality of Freedom*, supra note [2], at 64.

top-down affair; its most natural (although admittedly not inevitable) affiliation is with substantive theories of justification that are similarly top-down.

Let me next consider how the value-based conception works with the task-efficacy theory. It should be borne in mind that the former is a conception of the concept of legitimate authority, and the latter is a substantive theory which is addressed to the justification problem. I will use Finnis's version of the task-efficacy theory for purposes of illustration. Finnis describes the general character of the theory in the following way: "Authority (and thus the responsibility of governing) in a community is to be exercised by those who can in fact effectively settle co-ordination problems for that community."<sup>116</sup> He emphasizes the singularly important role of effectiveness – the expectation that most people will obey the de facto authority's directives – as follows: "[T]he sheer fact that virtually everybody will acquiesce in somebody's say-so is the presumptively necessary and defeasibly sufficient condition for the normative judgment that that person has (i.e. is justified in exercising) authority in that community."<sup>117</sup> To begin, notice the following three points. First, as the latter quotation makes clear, the task-efficacy theory is intended directly to justify legitimate authority; the argument does not proceed via an intermediate conclusion to the effect that there is a general obligation to obey the law. Second, the theory meets the value-of-intentionality requirement: It is implicit in the theory that there is (instrumental) value in the fact that someone has the effective say-so – the capacity – intentionally to solve co-ordination problems (or achieve other important collective goals) simply because people can be expected to do as he says. Third, the theory meets the prospectivity condition, since, as was explained in section III, effectiveness is most naturally understood as a present expectation of future acquiescence, rather than as future acquiescence as such.<sup>118</sup>

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<sup>116</sup> Finnis, *Natural Law and Natural Rights*, supra note [62], at 246 (emphasis in original).

<sup>117</sup> Ibid. at 250 (emphasis in original).

<sup>118</sup> See note [63] supra.

At this point it will be helpful to recall that the value-based conception of political authority insists that the value required by the theory attaches, strictly speaking, to the possession by the state of the capacity to intentionally change the normative situation of its subjects, rather than directly attaching to, say, the states of affairs that the exercise of that capacity might bring about. But instrumentalist theories of authority such as the task-efficacy view discern a systematic link between these two kinds of value, and effectiveness clearly provides just such a link: The essence of effectiveness is the sheer fact that people will generally do what the state demands, and this fact has instrumental value precisely because it puts the state in a position to pursue important moral goals, and bring about valuable states of affairs, on behalf of its subjects. If the state in fact pursues improper or evil goals, or even if it can simply be expected to pursue improper or evil goals in the future, it will lose the legitimacy that effectiveness *prima facie* confers (hence Finnis' stipulation that effectiveness is only a presumptively necessary and defeasibly sufficient condition for legitimate authority).

The task-efficacy theory, insofar as it looks to effectiveness as the sole source of value in the justification of authority, appears to advance a very stark, and indeed, by modern standards, quite radical, view of what legitimate political authority consists in. But its starkness can be softened in various ways. First, other factors can be treated as sources of value and still fall within the spirit of the theory. For example, expertise on the part of the authority, such as expertise in solving co-ordination problems generally, or technical expertise concerning e.g. the safe maintenance of aircraft, seems like a very plausible source of instrumental value in addition to effectiveness.<sup>119</sup> A similar point holds for efficiency in solving co-ordination problems. (Expertise and efficiency differ from effectiveness because the latter is defined strictly in terms of an expectation of future acquiescence.) Second, the task-efficacy theory is not limited to the

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<sup>119</sup> Notice that this sense of expertise is different from that presupposed by the NJT, which is strictly reason-based and comparative in nature.

solution of large-scale coordination problems. Finnis's discussion focuses on such problems, which of course figure very prominently in the modern regulatory state. But the idea of an important "collective" moral goal is meant only to capture the idea that the justification of political legitimacy must begin with the state's claim to hold authority over a group of persons, namely its citizens or subjects, and that its authority over individuals is determined by their membership in this group.<sup>120</sup> This is just another way of saying that the legitimacy of political authority must be determined non-aggregatively. In this sense, the legal protection of the individual rights of all citizens,<sup>121</sup> or the general maintenance of public order and safety, are collective moral goals that clearly fall within the purview of the task-efficacy theory.

However, these minor modifications and clarifications of the task-efficacy theory will no doubt strike many readers as failing to get at the heart of the problem, which is that there is no room in the theory's account of political legitimacy for such values as justice, say, or democracy. For purposes of illustration, let me concentrate on democracy. There is controversy about

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<sup>120</sup> Finnis's theory of authority is clearly non-aggregative in character, since authority is claimed by the state over a group of persons – in Finnis' terminology, a "complete community" -- and not over individuals one by one. Finnis, *Natural Law and Natural Rights*, supra note [62], at 147-53. It is in this sense that the task-efficacy theory can be said to be top-down in nature.

<sup>121</sup> In note [4] supra I distinguished between theories of political authority that begin with the justification of a normative power and theories that begin with the justification of the use of coercive force, and suggested that the general claims of this article apply to theories of both types. Ripstein's theory, which is of the second type, takes as its starting point the protection and enforcement of individual rights, where individual rights are understood as reciprocal limits on the freedom of all. In my view, his theory falls within the scope of the claims that I am making here about the nature of legitimate authority, because it clearly adopts a non-aggregative approach to the justification of authority.

whether democracy, or, more generally, process-based values, can be taken into consideration by the NJT.<sup>122</sup> But it seems clear that the task-efficacy theory has no place for democratic concerns. This is where the distinction between the concept of authority, as determined by the value-based conception of a moral power, and substantive theories of political authority, such as the task-efficacy view, becomes quite important. It will be recalled that the value-based conception of political authority insists that the value required by the theory must in the first instance attach to the possession by the state of the capacity to change the normative situation of its subjects, rather than attaching to, say, the states of affairs that the exercise of that capacity might bring about. The task-efficacy theory rightly discerns a systematic connection between the value of possessing the power and the value of the states of affairs that exercising the power can bring about. But other substantive theories of legitimate authority besides the task-efficacy theory are compatible with the value-based conception, which means that there are other sources of value besides effectiveness which can attach to the capacity to change persons' normative situation. Thus one kind of theory would find intrinsic value in the fact that the possessor of this capacity was democratically elected.<sup>123</sup> Another kind of theory would find instrumental value in this fact, in

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<sup>122</sup> Raz and Enoch say that they can. See Raz, "The Problem of Authority: Revisiting the Service Conception," *supra* note [81], at 1030-31; Enoch, "Authority and Reason-Giving," *supra* note [47]. Hershovitz disagrees. See Hershovitz, *supra* note [75].

<sup>123</sup> My student Douglas Weck is developing a theory of political authority along these lines. Weck's view, as I understand it, is that democratic authority can resolve reasonable moral disagreement in a way that is both fair and objective, and that has intrinsic moral value because it is partially constitutive of the moral bonds between persons. I believe that Thomas Christiano also understands democratic authority as having intrinsic value, although he does not use that term. See Christiano, *The Constitution of Equality* (Oxford: Oxford University Press, 2008), 231-59. Christiano believes that what he calls "inherent" legitimate authority involves a right to rule, where a right to rule is a claim-right that is (1) associated with a power to impose obligations and (2) correlative of a limited duty on the part of citizens to obey the law; this latter duty is owed

the sense that democratically-elected authorities would be considered to be more likely to make better substantive decisions.<sup>124</sup> (Such theories, being instrumental in character, clearly have an affinity with the task-efficacy theory.) Mixed accounts are possible: Two substantive theories, such as the task-efficacy view and the view that democracy has intrinsic value, can co-exist under the single conceptual umbrella of the value-based conception of political authority. If that is so, political legitimacy in the substantive sense might well turn out to be a very complex matter, which would be consonant with the wide range of views that we find in the literature concerning its true character.<sup>125</sup> In my opinion, the task-efficacy theory has an essential role to play in any plausible comprehensive account of legitimate political authority (to the extent that any such account can be given at all), but it can be combined with, or supplemented by, theories that take account of other values, including in particular that of democracy. Defending this proposition is, however, a very large project, which cannot be undertaken here.

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directly to the right-holder, which for Christiano is not the state as such but rather a democratic assembly. I do not believe that legitimate authority involves a claim-right that is correlative of a duty to obey the law and that is owed directly to either a democratic assembly or the state. Where a duty to obey exists, it is owed, if to anyone, to one's fellow citizens or to the community as a whole. See further *supra* note [49]. However, it is enough for present purposes that Christiano agrees that legitimate authority involves a power to impose obligations. He believes that "a properly constituted democratic assembly" "pools" the individual rights of citizens in such a way that each "can be said to have an equal say" over matters of law and policy. *Ibid.* 246-47. "Having an equal say" can only be important in this way, it seems to me, if it is regarded as possessing intrinsic value.

<sup>124</sup> David Estlund defends a view of this sort in David M. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2008).

<sup>125</sup> Here the Hohfeldian approach to political legitimacy intersects with other approaches, of the sort briefly discussed in section I. See note [11] *supra*, and accompanying text.



## VII. Conclusion

The main conclusion of this article is that the value-based conception of a moral power, which holds, very roughly, that one person has practical authority over another if there is sufficient value in the former person's being able intentionally to change the normative situation of the latter, is the moral and conceptual core of the concept of legitimate political authority. As we have seen, the value-based conception generates its own adequacy conditions for substantive theories of legitimate authority, namely, the value-of-intentionality and the prospectivity conditions, which rule out some substantive theories but rule in others. For the most part the article has addressed itself to a set of traditional problems in political philosophy, but in concluding I would like to at least cast a glance in the direction of a distinct but related branch of philosophy, namely, jurisprudence. Jurisprudence is related to political philosophy in many ways, but the one with which I am concerned here is the close relationship which clearly exists between the concept of authority and the concept of law. I would like to conclude with the perhaps overly bold suggestion that the value-based conception of a moral power is the conceptual core and, perhaps, – depending on one's views about descriptive versus normative jurisprudence – also the moral core both of jurisprudence and of law itself.

Rather than attempting to provide a full defense of this claim, I would like to illustrate my point with a piece of intellectual history. When Hart first introduced the distinction between primary and secondary rules in *The Concept of Law*, he wrote that “rules of the first type impose duties; rules of the second type confer powers, public or private.”<sup>126</sup> Later in the book, however, he wrote that secondary rules “may all be said to be on a different level from the primary rules, for they are all about such rules.”<sup>127</sup> It is this second idea, of secondary rules as metarules, that

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<sup>126</sup> Hart, *The Concept of Law*, supra note [25], at 81.

<sup>127</sup> Ibid. 94 (emphasis in original).

comes to prevail in *The Concept of Law*, and of the three kinds of secondary rules that Hart mentions, it is rules of recognition that come to predominate; the other two kinds, namely, rules of change and rules of adjudication, become less salient as Hart's discussion proceeds, and eventually all but disappear from view. The result is that the rule of recognition becomes the centerpiece of Hart's theory of law, and has been the subject of intense scrutiny among philosophers of law ever since. For example, one very familiar debate concerns whether or not rules of recognition give rise, or are capable of giving rise, to obligations or to any other kind of reason for action.

A rule of recognition is of course a duty-imposing rule (in form, at least), and rules of adjudication and rules of change are power-conferring rules. I have suggested elsewhere that, because of Hart's commitment to non-cognitivism, he had to come up with a characterization of secondary rules as social practices, and that it is much easier to do this for duty-imposing rules than for power-conferring rules.<sup>128</sup> Hence the role of power-conferring rules had to be downplayed, and the rule of recognition took center-stage. But it is far from obvious that this order of theoretical priority is correct. Jeremy Waldron has suggested, to my mind quite plausibly, that jurisprudence might do well to abandon the concept of a rule of recognition altogether.<sup>129</sup> Whether or not that is so, the theoretical priority that Hart eventually accords to rules of recognition over power-conferring secondary rules seems to me to be clearly in tension

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<sup>128</sup> See Stephen Perry, "Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View," *Fordham Law Review* 75 (2006), 1171, at 1177-1200; Perry, "Where Have All the Powers Gone: Hartian Rules of Recognition, Noncognitivism, and the Constitutional and Jurisprudential Foundations of Law," in M.A. Adler and K.A. Himma, *The Rule of Recognition and the U.S. Constitution* (New York: Oxford University Press, 2009), 295, at 305-18.

<sup>129</sup> Jeremy Waldron, "Who Needs Rules of Recognition?" in Adler and Himma, *supra* note [128], 327.

with his fundamental insight that “the introduction into society of rules enabling legislators to change and add to the rules of duty, and judges to determine when the rules of duty have been broken, is a step forward as important to society as the invention of the wheel.”<sup>130</sup> In other words, at the foundational level of law, it is legislative and judicial powers<sup>131</sup> that are most important, not judicial duties. My suggestion, which I cannot defend further here, is that in order to take this analysis further, we must look to the value-based conception of a moral power and to the understanding of legitimate political authority that that conception underpins.

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<sup>130</sup> Hart, *The Concept of Law*, supra note [25], at 41-42.

<sup>131</sup> Hart speaks of power-conferring rules, as he must given his view that the foundations of law are constituted by social rules, which in turn are constituted by social practices. In my view normative powers need not be embodied in rules (although they can be), and they certainly do not have to be constituted by social practices.